April 9th-63 Judge Davis

Opp- Strong

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~136~~. ~~154~~ 17

DAVID DOWS, JOHN DOWS MAIRS, AND ALEXANDER ECTOR ORR, PLAINTIFFS IN ERROR,

vs.

THE WISCONSIN MARINE AND FIRE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 19, 1873.

24 record
16

SUPREME COURT OF THE UNITED STATES.

No. 436.

DAVID DOWS, JOHN DOWS MAIRS, AND ALEXANDER ECTOR ORR, PLAINTIFFS IN ERROR,

vs.

THE WISCONSIN MARINE AND FIRE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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a UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, or some of you, between the Wisconsin Marine and Fire Insurance Company, plaintiff, and David Dows, John Dows Mairs, and Alexander Ector Orr, defendants, a manifest error hath happened, to the great damage of the said David Dows, John Dows Mairs, and Alexander Ector Orr, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 25th day of April, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed, April 25th, 1873.

SAM'L BLATCHFORD.

b UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages numbered from one to one hundred and two, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of David Dows et al., pl'ff, in error, vs. The Wisconsin Marine and Fire Insurance Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the said United States the ninety-seventh.

[SEAL.] KENNETH G. WHITE,
Clerk.

(Indorsed:) Supreme Court of the United States. David Dows, John Dows Mairs, and Alexander Ector Orr, plaintiffs in error, vs. The Wisconsin Marine & Fire Insurance Company, defendant in error. Writ of error. C. Van Santvoord, att'y for pl'ff in error. Filed Apr'l 25, 1873.

1 In the circuit court of the United States for the southern district of New York.

Pleas before the judges of the circuit court of the United States for the southern district of New York, at the city of New York, at the stated term of said court held at said city on the third Monday of October, 1869.

Witness the honorable Lewis B. Woodruff, one of the judges of said court.

KENNETH G. WHITE,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, at a stated term of the circuit court of the United States for the southern district of New York, held at the city of New York, in said district, before the judges of the said court, The Wisconsin Marine and Fire Insurance Company brought suit against David Dows, John Dows Mairs, and Alexander Ector Orr in this court, in the southern district of New York. And thereupon the said Wisconsin Marine and Fire Insurance Company, plaintiff, declared against the said David Dows, John Dows
2 Mairs, and Alexander Ector Orr, defendants, as follows, to wit:

CIRCUIT COURT OF THE UNITED STATES,
Southern District of New York, ss:

THE WISCONSIN MARINE AND FIRE INSURANCE Company, pl'ff, *ag'st* DAVID DOWS, JOHN DOWS MAIRS, AND ALEXander Ector Orr, def'ts. } Nov. 20, 1869.

The Wisconsin Marine and Fire Insurance Company, by Porter, Lowrey and Soren, its attorneys, complains of David Dows, John Dows Mairs, and Alexander Ector Orr, now in the custody of the marshal, &c., of a plea of trespass on the case for that whereas the said The Wisconsin Marine and Fire Insurance Company at all the times hereinafter alleged was and is now a corporation under that name, created by and existing under the laws of the State of Wisconsin, and a citizen of that State, and having its principal and usual place of business at the city of Milwaukee therein, and the said David Dows, John Dows
3 Mairs, and Alexander Ector Orr at the same times aforesaid were and are now severally citizens of the State of New York, and copartners doing business therein under the firm-name of David Dows and Company, the said plaintiff heretofore, to wit, on the 1st day of October, 1869, at the city of New York, in the State of New York, to wit, was the owner and was lawfully possessed as of its own property of certain wheat, to wit, of the following parcels thereof, namely, of seven thousand nine hundred (7,900) bushels, which were laden on the canal-boat Mine Dingman; of seven thousand eight hundred (7,800) bushels,

which were laden on the canal-boat Harman Post; of seven thousand six hundred and sixty (7,660) bushels, which were laden on the canal-boat E. D. Case; of two thousand eight hundred and twenty-five and fourteen one-hundredths ($2{,}825\frac{14}{100}$) bushels, which were laden on the canal-boat Anna Rebecca; being altogether twenty-six thousand one hundred and eighty-five and fourteen one-hundredths ($26{,}185\frac{14}{100}$) bushels of wheat or thereabouts, of great value, to wit, of the value of sixty thousand (60,000) dollars lawful money of the United States, and being so possessed afterwards, to wit, on the day and year aforesaid, at said city of New York, to wit, the said plaintiff casually lost said several parcels of wheat out of its possession, and the same afterwards, to wit, on the day last aforesaid, at said city of New York, to wit, came to the possession of said defendants by finding, yet the said defendants, well knowing the said several parcels of wheat and the whole thereof, to wit: the said twenty-six thousand one hundred and eighty-five $\frac{14}{100}$ ($26{,}185\frac{14}{100}$) bushels of wheat to be the property of the plaintiff, and of right to belong and appertain to it, but contriving and fraudulently intending craftely and subtly to deceive and defraud the said plaintiff in this behalf, have not as yet delivered the said wheat, or any part thereof, to the said plaintiff, though often requested so to do, and have hitherto wholly refused so to do, and afterwards, to wit, on the day and year last aforesaid, at said city of New York, to wit, the said defendants converted and disposed of the said several parcels and of the whole of said wheat to their own use, to the damage of the plaintiff the sum of seventy thousand dollars, and therefore it brings this suit.

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PORTER, LOWREY & SOREN,
Plaintiff's Attorneys, 78 Broadway, New York.

5 Circuit court of the United States for the southern district of New York, in the second district.

DAVID DOWS, JOHN DOWS MAIRS, AND Alexander Ector Orr *ads.* THE WISCONSIN MARINE AND FIRE Insurance Company. } Nov. 20, 1869.

And the said defendants, David Dows, John Dows Mairs, and Alexander Ector Orr, by C. Van Santvoord, their attorney, come and defend the wrong and injury when, &c., and say they are not guilty of the said supposed premises above laid to their charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff has above thereof complained against them; and of this they, the said defendants, put themselves upon the country.

C. VAN SANTVOORD,
Def'ts' Att'y.

And hereupon the process thereof is continued between the parties aforesaid of the plea aforesaid in this same court, before the judges thereof, and the issue above joined is ordered by the said court to be tried at the term of this court appointed to be held at the city of New York on the third Monday of October, in the year 1872, at which day and place last aforesaid come the parties aforesaid, by their attorneys aforesaid, before the judges of the said court, and the jurors of the jury summoned to try the said issue being called,

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also came, who to speak the truth of the matters aforesaid being chosen, tried, and sworn, say, upon their oath, that the said defendants are guilty of the premises above laid to their charge in manner and form as the said plaintiff hath above complained against them, and they assess the damages of said plaintiff, by reason of the premises, over and above his costs and charges by him about his suit and this behalf expended, to thirty-five thousand two hundred and five $\frac{28}{100}$ dollars.

Therefore it is considered that the said plaintiff do recover against the said defendants its said damages by the jurors aforesaid in form aforesaid assessed, and also fourteen hundred and thirty-three $\frac{46}{100}$ dollars for his costs and charges, by the court here adjudged of increase to the said plaintiff, with his assent, which said damages, costs, and charges, in the whole, amount to thirty-six thousand six hundred
7 and thirty-eight $\frac{74}{100}$ dollars.

(Endorsed:) Circuit court of the U. S., southern district of New York. Vol. 3, page 304. The Wisconsin Marine and Fire Insurance Company ag'st David Dows, John Dows Mairs, and Alexander Ector Orr. Filed Ap'l 19, '73, at 20 min. past 2 o'c'k.

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9 U. S. circuit court, southern district of New York.

THE WISCONSIN MARINE AND FIRE INSURANCE COMPANY
vs.
DAVID DOWS, JOHN DOWS MAIRS, AND ALEXANDER ECTOR ORR.

Bill of exceptions.

C. Van Santvoord, attorney for defendants.

New York: George F. Nesbitt & Co., printers, cor. Pearl and Pine streets. 1873.

Filed March 14, 1873.

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11 U. S. circuit court for the southern district of New York.

THE WISCONSIN MARINE AND FIRE INSURANCE COMPANY
vs.
DAVID DOWS, JOHN DOWS MAIRS, AND ALEXANDER ECTOR ORR.
} Bill of exceptions.

And afterwards, to wit, at a term of the circuit court of the United States, held at the city of New York, in and for the southern district of New York, in the second circuit, the issues so as above joined between the parties came on to be tried before the honorable William D. Shipman, and a jury for that purpose duly empaneled, good and lawful men of that district, on the 19th day of November, 1872.

The plaintiff's counsel, to maintain the issue on its part, read in evidence, first, the deposition of David Ferguson, of the city of Milwaukee and State of Wisconsin, taken in this cause, at Milwaukee, on the 17th day of February, 1870, on due notice to the attorney of the defendants, before Joseph Colt, as U. S. commissioner, as follows:

DAVID FERGUSON, being first duly sworn, deposes and says: I reside in Milwaukee, Wisconsin; I am about 49 years of age; I am cashier of the Wisconsin Marine and Fire Insurance Company; have been such cashier since 1853; I know the firm of Oliver & Hart, doing business in the city of Milwaukee, and knew them in September, 1869; I know the firm of George I. Jones & Co., doing business in the city of Milwaukee, and knew them in September, 1869. The firm of Oliver & Hart presented to the bank of which I am cashier, in the month of September, 1869, on or about the 22d, drafts on A. F. Smith & Co., of Oswego, N. Y.; two drafts, one at sight for ($3,750) thirty-seven hundred and fifty dollars, dated September 22, 1869, and one of the same date for ($19,462.74) nineteen thousand four hundred and sixty-two $\frac{74}{100}$ dollars, payable twenty (20) days after date; at the same time they presented a bill of lading dated September 22, 1869, for 18,754$\frac{50}{60}$ bushels wheat, shipped on the schooner Thomas Parsons.

The plaintiff's counsel here read in evidence said bill of lading, marked Exhibit No. 1, of which, with the endorsement thereon, the following is a copy:

12 EXHIBIT No. 1.

MILWAUKEE, *Sept.* 22, 1869.

Shipped by Oliver & Hart, as agents and forwarders, in good order and well conditioned, on board the schooner Thomas Parsons, whereof W. C. Harry is master, now in the port of Milwaukee, and bound for Oswego, the following property, marked and consigned as below, to be delivered in like good order as there addressed, or to his or their assigns, upon the payment of the freight and charges, as below stated, (the dangers of navigation, fire, and collision excepted.) In witness whereof the master or agent of said vessel hath affirmed to three bills of lading, of this tenor and date, one of which being accomplished, the other to stand void.

Ac. and order.
D. FURGUSON, *Cashier.*
OSWEGO, N. Y.

Original.

Eighteen thousand seven hundred and fifty-four $\frac{50}{60}$ bushels No. (2) Milwaukee spring wheat, (18,754$\frac{50}{60}$.) Lake freight, twelve (12) cents per bush. Captain to collect.

The said vessel hereby agrees to deliver the full quantity herein named, or pay for any part not delivered at the current market price, the value thereof to be deducted from the freight-money, the shippers hereby assigning to the vessel all rights they may have against the elevators for incorrect or wrong weighing.

W. C. HARRY.

(Endorsed:) Without recourse.

D. FERGUSON, *Cash.*

The bank discounted the above-mentioned drafts, and placed the proceeds thereof to the credit of Oliver & Hart. That discount was allowed on the faith of the bill of lading, with the drafts.

Q. What did the plaintiff do with the drafts and bill of lading?

A. The plaintiff forwarded them to the Merchants' Bank of Watertown, N. Y., by mail.

Q. Was a letter written, by the plaintiff, to said bank, in relation to the drafts and bill of lading? If yea, have you a copy of that letter, and will you produce that copy and make it a part of this your deposition?

A. I did write a letter, and here produce a copy of it, which is marked "Exhibit No. 2," and made a part of this deposition.

The plaintiff's counsel here offered to read said letter in evidence; the defendant's counsel objected to the reading of so much thereof as purported a direction to the Merchants' Bank to hold the wheat or bill lading for account the Milwaukee Bank until the payment of the draft, as not admissible until evidence was adduced that it was authorized by the arrangement under which the wheat was bought and shipped; also, as a private instruction from the Milwaukee Bank to the
13 Merchants' Bank, not admissible to effect the authority of the Merchants' Bank in respect to delivery as to third parties or as to these defendants. The plaintiff's counsel contended that it was admissible to show what were the rights and powers of the Merchants' Bank as the agent of the Milwaukee Bank, and as part and parcel of the res gestæ.

The learned judge overruled the objection and admitted the letter in evidence. Defendants excepted, and the letter was read as follows:

EXHIBIT No. 2.

D. Ferguson, *Cashier.* John Johnson, *Asst. Cashier.* Alex. Mitchell, *Pres.*

WISCONSIN MARINE AND FIRE INSURANCE CO. BANK,
Milwaukee, 22d Sept., 1869.

MERCHANTS' BANK,
Watertown, N. Y.:

DEAR SIR: I enclose for collection and remittance to Metropolitan National Bank, New York, for our credit,

A. F. Smith & Co		$3,750
do.	15 Oct	19,462 74

With B. L., &c., 18,754^{50} bushels No. 2 wheat, per schooner Tho's Parsons, to be held by you for our account till payment of the drafts.

Yours, truly,

D. FERGUSON, *Cashier.*

Q. Did the plaintiff receive a letter from the Merchants' Bank in reply? If yea, have you the original letter, and will you produce it?

A. We received a letter in reply, and I here produce the original, marked "Exhibit No. 3," and make it part of my deposition.

Said letter, Exhibit No. 3, was read in evidence as follows:

EXHIBIT No. 3.

MERCHANTS' BANK,
Watertown, N. Y., Sept. 27, 1869.

D. FERGUSON, Esq., *Cashier,*
Milwaukee:

DEAR SIR: I have received your letters of the 22d and 23d instant, with enclosures as stated, and they have attention.

Respectfully, yours,

J. F. MOFFATT, *Cashier.*

Q. State whether either of the drafts, and if yea, which of them, remains unpaid.

A. The draft for $19,462.74 remains unpaid—that is the time-draft; that time-draft has come back into the possession of the plaintiff. I have the original draft.

The said draft, Exhibit No. 4, was here read in evidence, with certificate of protest annexed. The following is a copy of the draft, Exhibit No. 4:

14 EXHIBIT No. 4.

$19,462.74.] MILWAUKEE, *September 22d*, 1869.

Twenty days after date pay to the order of D. Ferguson, cashier, nineteen thousand four hundred and sixty-two $\frac{74}{100}$ dollars, and charge to the account of

OLIVER & HART.

To Messrs. A. F. SMITH & Co., *Oswego, N. Y.*
MERCHANTS' BANK, *Watertown, N. Y.*
(Written across face:) A. F. SMITH & Co.

[$9.75 stamps. Cancelled.]

(Endorsed on back:)

Pay Merchants' Bank, Watertown, New York, or order.
D. FERGUSON, *Cashier.*

The certificate of protest annexed was a certificate by J. F. Moffatt, notary public, of presentation of draft at Merchants' Bank, and demand of payment October 15th, 1869, and of protest for non-payment, and of service of due notice of demand and protest.

Notice for A. F. Smith & Co., directed to Oswego, N. Y.
" Oliver & Hart, " " Milwaukee, Wis.
" D. Ferguson, cashier, " " Milwaukee, Wis.

The firm of George I. Jones & Co. presented on the 23d of September, 1869, to the plaintiff, for discount, two drafts, both dated Sept. 23, 1869, one for $3,750 at sight, and one for $14,472.15, payable thirty (30) days after date, and at the same time presented to the plaintiff, with those drafts, a bill of lading dated Sept. 23, 1869, for 14,867 bushels of wheat, shipped on board schooner Atmosphere.

On the faith of the bill of lading, with the drafts, the plaintiff discounted the drafts for said firm, and placed the proceeds to their credit. The sight-draft was sent to the Second National Bank of Oswego, and paid.

Q. What was done with the time-draft and bill of lading?

A. It was sent in a letter to the Merchants' Bank of Watertown for collection, a copy of which letter I here produce, and make a part hereof, and marked "Exhibit No. 9."

The plaintiff's counsel here offered to read said letter in evidence.

Defendants' counsel objected to the reading of this letter on same grounds as above stated to the reading of the letter Exhibit No. 2.

Objection overruled by the judge, and defendants excepted.

The letter was read as follows:

EXHIBIT No. 9.

D. FERGUSON, *Cashier.* ALEX. MITCHELL, *President.* JOHN JOHNSTON, *Asst. Cashier.*

WISCONSIN MARINE AND FIRE INSURANCE CO. BANK,
Milwaukee, Sept. 23, 1869.

MERCHANTS' BANK, *Watertown, N. Y.:*

DEAR SIR: I enclose for collection and returns by rem. to the Metropolitan National Bank, N. Y., for our cr., draft on A. F.
15 Smith & Co., $14,472.15. Attached to this draft are certificates of insurance, &c., B. L. for 14,876 bushels of wheat per schooner Atmosphere, which property you will hold on our ac. till the draft is paid.

Yours, truly,

JOHN JOHNSTON,
Asst. Cashier.

I received a reply from the Merchants' National Bank, dated Sept. 27, 1869, Exhibit No. 3 above. The time-draft has not been paid. I have the original draft and protest, and here produce it.

The said draft, Exhibit No. 10, was here read in evidence, with certificate of protest annexed. The following is a copy of the draft:

EXHIBIT No. 10.

OFFICE OF GEO. I. JONES & CO., COMMISSION MERCHANTS,
9830 23–26*th Oct.*
$14,472.15.] MILWAUKEE, 23*d Sept.*, 1869.

In current funds (30) thirty days after date, pay to the order of D. Ferguson, esq., cashier, fourteen thousand and four hundred and seventy-two $\frac{15}{100}$ dollars for value received. B. L. 14,867 bus. No. 2 wheat, per schr. Atmosphere, attached.

GEO. I. JONES & CO.

To A. F. SMITH & Co.,
Oswego, N. Y., at Merchants' Bank of Watertown, N. Y.

(Written across face:) A. F SMITH & Co., prot. Oct. 26, 1869. J. F. M., N. P.

(Endorsed on back:)
[$7.25 stamps. Cancelled.]
Pay Merchants' Bank, Watertown, New York, or order.
JOHN JOHNSTON, *A. Cas.*

The certificate of protest annexed was a certificate by J. F. Moffit, notary public, of presentation of the draft at Merchants' Bank and demand of payment Oct. 26, 1869, and of protest for non-payment, and of service of due notice of demand and protest; notice for A. F. Smith & Co., directed to Oswego, N. Y.; notice for George I. Jones & Co., directed to Milwaukee, Wis.; notice for D. Ferguson, cashier, directed to Milwaukee, Wis.

I have the original bill of lading which accompanied the draft, and here produce it.

The plaintiff's counsel here read in evidence said bill of lading, marked Exhibit No. 11, with the endorsements thereon, as follows:

16 EXHIBIT No. 11.

MILWAUKEE, 23*d Sept.*, 1869.

Shipped by Geo. I. Jones & Co., as agents and forwarders, in good order and well conditioned. on board the schooner Atmosphere, whereof J. Anderson is master, now in the port of Milwaukee, and bound for Oswego, the following property, marked and consigned as below, to be delivered in like good order as there addressed, or to his or their assigns, upon the payment of the freight and charges as below stated, the dangers of navigation, fire, and collision excepted. In witness whereof the master or agent of said vessel hath affirmed to two bills of lading of this tenor and date, one of which being accomplished, the other to stand void.

(14,867) fourteen thousand eight hundred and sixty-seven bushels No. 2 Milwaukee spring wheat; freight to Oswego twelve (12) cents per bushel of 60 lbs. C. C.

Ac. D. Ferguson, cashier, or order.
Care Merchants' Bank, Watertown, at Oswego, N. Y.
Original.

The said vessel hereby agrees to deliver the full quantity herein named, or pay for any part not delivered at the current market price, the value thereof to be deducted from the freight-money, the shippers hereby assigning to the vessel all rights they may have against the elevators for incorrect or wrong weighing.

J. ANDERSON, *Master.*

(Endorsed on back:) "Without recourse."

D. FERGUSON, *Cashier.*

Q. Did Oliver & Hart and Geo. I. Jones & Co., at the time of the delivery to the plaintiff of the draft and bills of lading before mentioned, also deliver receipts or certificates of insurance upon the cargoes?

A. They did leave certificates of insurance on all the cargoes with the plaintiffs. I have the original certificates with me.

The certificates of insurance were here read in evidence. The certificates of insurance on the cargo of the Thomas Parsons were dated Sept. 22d, 1869, and certified that Oliver & Hart were insured under and subject to condition of policy referred to therein, on wheat inboard cargo schooner Thomas Parsons, at and from Milwaukee to Oswego, loss, if any, payable to the assured, or order thereon, and return of that certificate, and were indorsed in blank "Oliver & Hart."

The certificates of insurance on the cargo of the Atmosphere were dated Sept. 23d, 1869, and certified that Geo. I. Jones & Co. were insured under and subject to the condition of policy referred to
17 therein on wheat inboard cargo schooner Atmosphere, at and from Milwaukee to Oswego, loss, if any, payable to the assured or order thereon, and return of that certificate, and were endorsed in blank "Geo. I. Jones & Co."

Defendants' counsel read from cross-examination as follows:

Q. Did you not know that the grain must be unloaded from the vessels at Oswego, and not at Watertown?

A. I did.

Q. Did you expect that the grain or any portion of it would go to Watertown?

A. I did not so expect.

Q. Was the bank at Watertown the agent of the plaintiff for the reception and placing of the wheat in question at Oswego?

A. I should say they were.

Q. Did the plaintiff pay any portion of the lake freight on the cargoes in question?

A. No.

Q. Between the time plaintiff discounted drafts for the purchase of the wheat in question and the suspension of A. F. Smith & Co. did plaintiff make any inquiries as to where the wheat was stored in Oswego?

A. No.

Q. To what extent had plaintiff, previous to the transactions in question, discounted drafts drawn against A. F. Smith & Co., accompanied by bills of lading upon Oswego?

A. We discounted drafts for two cargoes, one in June and one in August, 1869; and I think there were some cargoes taken the year previous, but I have not the particulars.

The plaintiff's counsel proposed to read the question and answer next immediately following from the cross-examination in the deposition of this witness.

The same was objected to by defendants' counsel as inadmissible, as calling for witnesses' mental conclusion, and not for a fact, and irrelevant.

The court decided it would permit it to be read.

Defendants' counsel excepted, and the same was read as follows by plaintiff's counsel:

Q. At the time the bank which you represent took the drafts in question, had you any reason to suppose that the grain referred to would go into the elevator of A. F. Smith & Co., of Oswego?

A. I had no reason to suppose so. I did not know at the time they had an elevator.

The plaintiff's counsel proposed to read the question to the witness and the answer.

Q. Did you understand that the bank at Watertown had undertaken to take care of the grain in question for the plaintiff?

A. I did understand so.

Defendants' counsel objecting, the reading was waived, the plaintiff's counsel proposing to read the next question and answer as follows, (from cross-examination in the deposition:)

Q. Was it for this reason that you endorsed bill of lading of the sch'r Tho's Parsons without recourse?

A. I endorsed the bill of lading without recourse, as I did not
18 wish to be liable for any shortage or any other claim that might come against us. It is our habit so to do.

The defendants' counsel objected to the answer as inadmissible, as calling upon the witness to give the legal effect of the endorsement on the bill of lading, and as an attempt to limit the effect of the endorsement.

The judge decided that he would not admit the evidence for the purpose of taking the opinion of the witness upon the legal effect of the endorsement—he would instruct the jury as to that; that he would permit the plaintiff to read the question and the answer, excepting the words, "It is our habit so to do."

The defendants' counsel excepted to such ruling and decision, and plaintiff's counsel read the answer as follows:

A. I endorsed the bill of lading without recourse, as I did not wish to be liable for any shortage or any other claim that might come against us.

The plaintiff then read from the cross-examination in the deposition of the witness as follows:

Q. Did plaintiff send bill of lading or copy thereof of any of the cargoes in question to A. F. Smith & Co., at Oswego?

A. No.

Q. Had plaintiff any knowledge where the cargoes referred to in your last answer were stored on their arrival at Oswego?

A. No.

Q. Please produce and attach to your deposition all correspondence between plaintiff and the Merchants' Bank at Watertown relating in any way to the cargoes in question.

A. I produce to the commissioner two telegrams received, one signed N. Winslow, and the other J. F. Moffatt, cas., endorsed on the back of each in lead-pencil "copy of original draft of my telegrams;" to which the above two telegrams are answers; and I also produce letters as follows:

One dated Watertown, N. Y., Sept. 29, 1869; and one
Do., do., Oct. 18, 1869; and one
Do., do., Oct. 20, 1869; and one
Do., do., Oct. 23, 1869; and one
Do., do., Oct. 26, 1869; and one
Do., do., Oct. 30, 1869;

Also a copy of a letter sent by plaintiff, dated Milwaukee, Oct. 25, 1869.

The plaintiff here read in evidence the telegrams referred to in the answer, marked Exhibits Nos. 12 and 13, and Exhibits Nos. 14, 15, 16, 17, 18, 20, 19, as follows:

EXHIBIT No. 12.

Copy, 16 Oct., 1869.

MER. B'K, *Watertown:*

Did A. F. Smith & Co. pay d'f. due yesterday? You, of course, hold wheat, as directed, for all our paper sent you.

(A true copy of the original.)

19 ANSWER TO ABOVE.

Dated at Watertown, N. Y., Oct. 16, 1869. Received at Oct. 16.

To D. FERGUSON:

A. F. Smith & Co. did not pay draft due yesterday.

J. F. MOFFAT, *Cas.*

EXHIBIT No. 13.

Copy, 21 Oct., 1869.

MER. B'K, *Watertown, N. Y.:*

You do not return bill of lading with Oliver & Hart's d'ft. We shall look to you for the wheat covered by it.

(A true copy of the original.)

ANSWER TO ABOVE.

Dated Watertown, N. Y., Oct. 21, 1869. Received at Mil., Oct. 21—2.10 p. m.

To D. FERGUSON:

Bill of lading has been sent. I have incurred no liability.

N. WINSLOW.

EXHIBIT No. 14.

NORRIS WINSLOW, *Banker.* J. F. MOFFATT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Sept. 29, 1869.

D. FERGUSON, Esq., *Cashier:*

DEAR SIR: We this day remit to the Metropolitan National Bank, N. Y. City, for your credit, $3,750, less ex., $4.50. $3,745.50 accept of A. F. Smith & Co.

Yours,

J. F. MOFFATT,
Greenleaf.

EXHIBIT No. 15.

NORRIS WINSLOW, *Banker.* J. F. MOFFATT, *Cashier*

MERCHANTS' BANK,
Watertown, N. Y., Oct. 18, 1869.

D. FERGUSON, Esq., *Cashier,*
Milwaukee, Wis.:

DEAR SIR: Please find enclosed, under protest, A. F. Smith & Co., $19,462.74. Fees, $1.54.

Yours, respectfully,

J. F. MOFFATT.

20 EXHIBIT No. 16.

NORRIS WINSLOW, *President.* J. F. MOFFATT, *Cashier*

MERCHANTS' BANK,
Watertown, N. Y., Oct. 20, 1869.

D. FERGUSON, Esq., *Cashier,*
Milwaukee, Wis.:

DEAR SIR: I enclose herewith a bill of lading, &c., for 18,754.30 bushels No. 2 wheat, Thomas Parsons; also certificates of insurance attached to draft A. F. Smith & Co., $19,462.74, due October 15th. We suppose these were sent with drafts, but they were overlooked. They have not been out of our possession.

Yours, respectfully,

J. F. MOFFATT.

EXHIBIT No. 17.

NORRIS WINSLOW, *President.* J. F. MOFFATT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Oct. 23, 1869.

D. FERGUSON, Esq., *Cashier:*

DEAR SIR: I return, under protest, A. F. Smith & Co., $16,315.20;

fees, $1.54. I also return the bills of lading and insurance policy, accompanying the draft.

Yours, very truly,

J. F. MOFFATT.

EXHIBIT No. 18.

NORRIS WINSLOW, *President.* J. F. MOFFATT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Oct. 26, 1869.

D. FERGUSON, Esq., *Cashier,*
Milwaukee, Wis.:

DEAR SIR: I enclose herewith, under protest, A. F. Smith & Co., due to-day, for $14,472.15; fees, $1.54. Also enclose bill of lading for $14,867 bushels No. 2 Mil. sp'g wheat, and insurance policies, attached to draft.

Very respectfully, yours,

J. F. MOFFATT.

EXHIBIT No. 20.

D. FERGUSON, *Cashier.* JOHN JOHNSTON, *Ass't Cashier.* ALEX. MITCHELL, *President.*

(Copy.)

WISCONSIN MARINE AND FIRE INSURANCE CO. BANK,
Milwaukee, 25th Oct., 1869.

J. F. MOFFATT, Esq., *Cash.,*
Watertown, N Y.:

DEAR SIR: I have your favor of the 20th inst., returning B. L. 21 &c., for 18,754.60 bush. wheat, per Tho's Parsons. I will thank you to inform me if you gave any order for the delivery of the wheat; and, if so, what. Also whether the capt. of the vessel reported to you, or had any communication with you.

Yours, resp'y,

D. FERGUSON, *Cash.*

EXHIBIT No. 19.

NORRIS WINSLOW, *President.* J. F. MOFFATT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Oct. 30, 1869.

D. FERGUSON, Esq., *Cashier:*

I' reply to yours of the 25th inst., I would say the schooner Thos. Parsons was ordered to deliver her cargo to the Corn Exchange elevator, Oswego, N. N.

Truly, yours,

J. F. MOFFATT.

These, with Exhibits two, three and nine, are all the letters and telegrams which passed between the plaintiff and the Merchants' Bank at Watertown in relation to the cargoes in question.

The foregoing exhibit, No. 19, was read against the objection of de-

fendants' counsel, which was overruled by the judge, and the defendants' counsel excepted.

Plaintiff's counsel here read in evidence the deposition of Thomas E. Jones, of the city of Milwaukee, and State of Wisconsin, taken on the 17th day of February, A. D. 1870, before Joseph Colt, esq., as U. S. commissioner, as follows:

THOMAS E. JONES, being first duly sworn, deposes and says: I reside in Milwaukee, Wisconsin; I am thirty-four years of age; I am foreman in elevator "A;" was such foreman in September, 1869. That elevator is a large warehouse in the city of Milwaukee; Angus Smith & Co. are the proprietors of said elevator; my duties as such foreman were to see to the shipping of grain, and to exercise a general supervision over the elevator; I was at the elevator in the month of September last; there were (8,840$\frac{10}{60}$) eighty-eight hundred and forty $\frac{10}{60}$ bushels wheat loaded from said elevator on board the schooner Tho's Parsons September 21, 1869; I was present and saw it loaded aboard the vessel. I find from my books that no other wheat than the amount above mentioned was shipped from said elevator "A" on the above dates in the aforementioned vessel.

THO'S E. JONES.

Plaintiff's counsel here read in evidence the deposition of Peter Scherer, of the city of Milwaukee, and State of Wisconsin, taken on the 18th day of February, A. D. 1870, before Joseph Colt, esq., United States commissioner, as follows:

PETER SCHERER, being first duly sworn, doth depose and say: I reside in Milwaukee, Wisconsin. In the month of September, 1869, I was foreman of Angus Smith & Co.'s elevator "B," a warehouse in
22 the city of Milwaukee; on September 23, 1869, 11,600 bushels number two (2) wheat was loaded from said elevator on board schooner Atmosphere; I superintended the loading of the vessel to the best of my knowledge; no other vessel of that name was at said elevator in September, 1869, as appears from the elevator books.

PETER SCHERER.

Plaintiff's counsel here read in evidence the deposition of Reuben S. Beach, of the city of Milwaukee, and State of Wisconsin, taken on the 18th day of February, A. D. 1870, before Joseph Colt, esq., as United States commissioner, as follows:

REUBEN S. BEACH, being first duly sworn, deposes and says: I live in Milwaukee, Wisconsin; am forty-eight years of age. In September, 1869, was foreman of Angus Smith & Co.'s elevator "D;" that elevator is located in the city of Milwaukee. In the month of September, 1869, on the 21st of said month, 9, 914 $\frac{40}{60}$ bushels wheat were loaded from said elevator on board schooner Thomas Parsons. I was present and superintended the loading of the wheat. On the 22d of September, 1869, 3,267 bushels of wheat were loaded from said elevator on board the schooner Atmosphere. I was present and superintended the loading of the wheat; the schooner Thomas Parsons was loaded with number two (2) wheat, and the schooner Atmosphere with number two wheat also. No vessels of the same name, besides these, were loaded with wheat at said elevator in the month of September, 1869.

REUBEN S. BEACH.

The plaintiff's counsel next read in evidence from the deposition of George I. Jones, of said city of Milwaukee, taken on the 24th day of

February, A. D. 1870, before Joseph Colt, as U. S. commissioner, as follows:

I am of the firm of George I. Jones & Co., general commission merchants, doing business in the city of Milwaukee, Wisconsin; I know the plaintiff in this suit, the Wisconsin Marine and Fire Insurance Company; it has its place of business in the city of Milwaukee; the firm of Geo. I. Jones & Co. loaded the sch'r Atmosphere with wheat in Milwaukee in the month of September, 1869; on board the schooner Atmosphere they loaded 14,867 bushels number two (2) Milwaukee spring wheat; said firm purchased said wheat in Milwaukee and paid for it; said firm received bills of lading for the wheat thus shipped; I think the bill of lading of the Atmosphere was signed in our office at the day of its date. After Geo. I. Jones & Co. received the original bill of lading they attached it to drafts drawn by our firm on A. F. Smith & Co., of Oswego, N. Y., and then presented the drafts, with the bill of of lading attached, to the plaintiff for discount; the plaintiff discounted the drafts; the drafts were discounted on the 23d of September, 1869. My firm insured said cargo and delivered the certificates of insurance to the plaintiff with the drafts and bill of lading; this cargo was loaded from the elevators of Angus Smith & Co., at Milwaukee. We shipped no other cargoes than the one mentioned at or about the said dates
23 in the above-named vessel to Oswego. I was in the city of Oswego, N. Y., in the latter part of October, 1869; I was at the office of the Corn Exchange elevator in that city, with Mr. McLaren.

Telegrams were prepared and sent to defendants; the paper shown me is the original draft of telegram sent to defendants.

Q. Did you take the original to the telegraph office and cause it to be sent?

A. I did, and prepaid the charges.

The plaintiff here called upon the defendants' counsel to produce a telegram from Oswego, dated October 22, 1869, purporting to be signed by D. Ferguson, cashier. The defendants' counsel produced a telegram of that date, received by them at 5 p. m. on the 22d, and the same was read in evidence by the plaintiff's counsel, and the following, Exhibit No. 2, (G. I. J.,) is a copy:

EXHIBIT No. 2, (G. I. J.)

OSWEGO, 22*d October*, 1869—4 *p. m.*

DAVID DOWS & CO., *New York City:*

Seventy-nine hundred (7,900) bushels wheat shipped to you from Oswego, October fourth, (4th,) eighteen hundred and sixty-nine, (1869,) on canal-boat Mine Dingman; and seventy-eight hundred (7,800) bushels wheat shipped to you from Oswego, October fifth, (5th,) eighteen hundred and sixty-nine, (1869,) on canal-boat Harm and Port; and seventy-six hundred and sixty (7,660) bushels wheat shipped you from Oswego, same day, on canal-boat E. D. Case; and twenty-eight hundred and twenty-five (2,825) bushels wheat shipped you from Oswego, October eight, (8,) eighteen hundred and sixty-nine, (1869,) on canal-boat Anna Rebecca, from schooner Atmosphere, is the property of the Wisconsin Marine and Fire Insurance Company, of Milwaukee, which will hold you responsible for the same.

D. FERGUSON,

$3.56 *Cashier Wisconsin Marine and Fire Insurance Co. of Milwaukee.*

Q. Did you go from the city of Oswego to New York City?
A. I did.
Q. How soon, after sending these dispatches, before you left Oswego for New York City?
A. The same day.
Q. When did you arrive in New York City?
A. The following morning.
Q. Did you see the defendant, David Dows, in New York City on the morning of your arrival?
A. I did.
Q. Did you have any conversation with him that morning in relation to the wheat in question and telegrams?
A. Yes.
Q. State what that conversation was.
A. Mr. Dows admitted the receipt of the dispatch referred to, and said he would notify us of the arrival of the wheat, and on its arrival point it out to us, provided we did not attempt to stop
24 the wheat by replevin on the canal; and that, if he caused the wheat to be put in store, he would keep each boat-load separate, and identify it as the wheat coming out of those canal-boats, and would only require us to prove the identity of our wheat into said canal-boats. He said that in this he did not admit our right to the wheat.

Cross-examination by defendants' counsel:

Q. On what authority did you buy the cargo mentioned? Please produce the same, if in writing, and also all letters and telegrams from A. F. Smith & Co. to your house in any way relating to the cargo of the Atmosphere.

A. I bought the cargoes of the Gerritt Smith and Atmosphere at the request of A. F. Smith & Co., on telegrams from them. I here produce three telegrams and four letters, which are all the telegrams and letters from A. F. Smith & Co. relating to said cargoes.

Said telegrams, marked No. 7, 8, and 9, (G. I. J.,) respectively, and said letters, Exhibits No. 10, 11, 12, and 13, (G. I. J.,) respectively, were here read by defendants' counsel in their order of time.

EXHIBIT No. 10. (G. I. J.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.]

OSWEGO, N. Y., *Sept. 15th*, 1869.

Messrs. GEO. I. JONES & Co.,
Milwaukee, Wis.:

GENTLEMEN: We shall want some more wheat for our local trade, and, though prices may be lower when receipts increase, still, any decline is likely to be counterbalanced, in a measure at least, by advance in freights; and, as we need the wheat, we think it may be as well to buy it now, if you can draw as before, say st. for margin, balance 30 & 45 days, through Merchants' Bank, Watertown, you may buy and ship us cargo choice 1 wheat, on receipt. Our local trade requires a little time, as we have before explained to you, but for anything else we are always prepared to pay sight. We shall hope to hear from you

when the crop movement becomes more general in the way of consignment. Please advise by telegraph what you do, and oblige,

Yours, truly,

A. F. SMITH & CO.

(Endorsed :)
1869.
A. F. SMITH & Co.
15 Sep.
Rec. 20 "
Ans. " "

25 EXHIBIT No. 7. (G. I. J.)

Dated East Oswego, 16th, 1869. Received at Mil. Sept. 16.

To GEO. I. JONES & Co.:

Buy us cargo No. one (1) & cargo No. (2) two choice Milwaukee wheat. Draw as before, Merchants' Bank. Answer.

A. F. SMITH & CO.

EXHIBIT No. 8. (G. I. J.)

Dated Oswego, 16, 1869. Received at Mil. 1.45 p. m., R.

To GEO. I. JONES & Co.:

You may ship cargo No. one (1.) Load schooner Gerritt Smith if not already chartered.

A. F. SMITH & CO.

14 | 209. Pd.

EXHIBIT No. 11. (G. I. J.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 16, 1869.

Messrs. GEO. I JONES & Co.,
Milwaukee:

GENTLEMEN: We wrote you yesterday to purchase us cargo No. 1 wheat, but this morning, thinking the matter over, and in view of the sudden fluctuations to which your market is liable, thought it best to give you the order by telegraph, which we did, increasing it by ordering cargo No. 2 also. Your reply, that the bank declined doing any paper longer than 30 days came to hand, and we answered, you may ship cargo; load sch'r Gerritt Smith, if not already chartered. Your night message is at hand, advising her charter and purchase 2,000 bush., 125½. Hope you may secure balance at equally good price. Please make time as favorable as possible.

Yours, truly,

A. F. SMITH & CO.

(Endorsed :)
1869.
A. F. SMITH & Co.
16 Sep.
Rec. 20 "
Ans. 21 "

EXHIBIT No. 9. (G. I. J.)

Dated East Oswego, 21, 1869. Received at Milw. Sept. 21.

To GEO. I. JONES & Co.:

You may buy and ship us cargo prime two (2) wheat. Draw as before, Merchants' Bank.

A. F. SMITH & CO.

26 EXHIBIT No. 12. (G. I. J.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 25, 1869.

Mess. GEO. I. JONES & Co.,
Milwaukee:

GENTS: Yours of the 23d, with invoice, at hand, which seems correct; will examine, and if any errors or omissions should be found, we will report. Our object in getting draft from the west, time payable at Watertown, is, that we have always trade for local in that direction, and keep our account at Merchants' Bank, Watertown, and make all our collections through them, and always have funds there. We cannot see what, if any, difference it could possibly make to your bank whether they draw time on us there or here, and does make some difference to us. I think there will be no difficulty in getting it done in the way that most conveniences and accommodates us.

Yours, truly,

A. F. S. & CO.

P. S.—Drafts not here will be protected on presentation.

P. S.—We must say that we think pretty well of the future of wheat, providing Europe continues to take our surplus. Your market may get down to 1.10, perhaps lower, for No. 2, but if N. Y. gamblers don't get all the money, we think well of it at about present price for shipment at present freight, and particularly so when we consider the lateness of the season to move the crop in.

Yours,

A. F. S.

EXHIBIT No. 13. (G. I. J.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 25, 1869.

Mess. GEO. I. JONES & Co.,
Milwaukee, Wis.:

GENTS: Your several letters and telegrams are here, and noted, also your drafts in and honored. Our Mr. B. is away attending upon a sick father, which leaves short-handed for few days; you will therefore please excuse if we don't promptly answer all letters. What will be the future of wheat is what our customers want to know; we have agreed to find out if we could. Please give us the desired information.

Yours, truly,

A. F. S. & CO.

Q. Did your firm pay for the two cargoes? If so, on what days?

A. We did; on the 22nd of September we paid for the cargo
27 of the Atmosphere, and on the 17th and 18th of September we paid for the cargo Gerritt Smith.

Q. Please attach invoice of the purchase of the two cargoes sent to A. F. Smith & Co., or copies of the same, together with letters enclosing same.

A. I produce copies of invoices, and letters accompanying same. The letters and invoices were sent by mail to A. F. Smith & Co. at the day of their date.

Counsel for the defendant here read invoice of the cargo of schooner Atmosphere, of which Exhibit No. 16 (G. I. J.) is a copy, and also the letter inclosing it to A. F. Smith & Co., of which Exhibit No. 17 (G. I. J.) is a copy, as follows:

EXHIBIT No. 16. (G. I. J.)

Invoice, 14,867 *bushels No. 2 Milwaukee spring wheat. Bought by Geo. I. Jones & Co, Milwaukee, and shipped per schooner Atmosphere, for account and risk of Messrs A. F. Smith & Co., Oswego.*

1869.					
Sept. 22.	4,000	bushels No. 2	wheat in store, @	$1 17	4,680
"	8,000	"	"	1 16¾	9,340
"	2,867	"	"	1 16½	3,340
	14,867 bushels—				$17,360

CHARGES.

Storage, @ 2 c. per bushel		297 34	
Inspection, @ 30 c. per 1,000 bushels		4 46	
Weighing, @ 30 c. per 1,000 bushels		4 46	
Fire insurance, while in store awaiting shipment		17 40	
Lake insurance from Milwaukee to Oswego, $19,625, @ $\frac{60}{100}$		117 75	
Interest on time-draft, 33 days, @ 10 per ct. per annum		132 66	
Discount on exchange, ½ per ct. on sight-draft			
Discount on exchange, ¼ per ct. on time-draft	108 54	127 29	
Internal-revenue stamps on time-draft		7 25	
Commission		148 67	
Interest from time of payment to date		4 82	
			862 15
			18,222 15

CR.

Sept. 23, By our demand-draft	3,750	
" " " " 30 days draft	14,472 15	
		18,222 15

28 E. E. Milwaukee, 23d Sept., 1869.
(Copy.) (Signed) GEO. I. JONES & CO.

EXHIBIT No. 17. (G. I. J.)

Messrs. A. F. SMITH & Co., *Oswego:*

SEPTEMBER 23, '9.

DEAR SIRS: The schooner Atmosphere completed her loading this morning, and we now beg to hand you invoice of her cargo: 14,867

bushels No. 2 Milwaukee spring wheat, amounting to $18,222.15, against which we have drawn $3,750 at sight, and $14,472.15 at 30 days, at Merchants' Bank of Watertown, attaching to latter the B. lading and other documents, all of which we trust will be found correct and satisfactory.

The receipts of wheat were 92,000 bushels, and our market was pretty steady at the close, at 1.16 for No. 2 and 1.20½ for No. 1. Our receipts were 6,000 greater than those in Chicago, and, notwithstanding our vastly superior quality, our prices were ½ less. Our bankers tell us that we can always get in the fall as much time paper payable in Oswego as they care to take, and suggest our saying to you that should you wish ready negotiation it would be well to authorize future drafts on Oswego instead of Watertown.

Yours, respectfully,

GEO. I. JONES & CO.

Q. Where did your firm do your banking business?

A. At the Wisconsin Marine and Fire Insurance Company, in Milwaukee.

Q. How long have you done it there?

A. For eight years past.

Q. During that time has the business of your firm been the same that it was in September last?

A. Yes.

Q. Did you send any bill of lading, or copy of any, of either of the two cargoes in question to A. F. Smith & Co.?

A. No.

Q. Did your firm pay any portion of the lake freight of either of the two cargoes?

A. No.

Q. Did you procure discount of the drafts drawn upon A. F. Smith & Co. for the purchase of the two cargoes in question personally of your banker?

A. No; my brother, Mr. Charles P. Jones, did the business with the bank.

Q. Did your firm, or any one of them, direct the captains of the two vessels referred to where to report on their arrival at Oswego?

A. We did not.

Q. During the time between the departure of the schooners Smith and Atmosphere from Milwaukee and the failure of A. F. Smith & Co. to meet their paper, did your firm know or hear where the cargoes in question were stored, at Oswego?

29 A. We did not.

Q. During that period did your firm make any inquiry in that regard?

Q. No.

A. At the time of the purchases in question did your firm know that A. F. Smith & Co. were proprietors or part proprietors of an elevator at Oswego?

A. Yes, we knew it by report; had seen on a card that certain other parties in Oswego were interested with him. I think Delos De Wolf and Tho's J. Mott.

Q. What was Mr. De Wolf's business, if he had any other?

A. He was president of the City Bank of Oswego. Mr. Mott was president of the First National Bank of Oswego.

Q. Previous to the transactions in question had you purchased and

shipped grain to Oswego for A. F. Smith & Co? If yea, how many cargoes; give their dates, also the amount of any drafts drawn against Smith & Co. for such purchases, and where the same were discounted.

A. The paper here produced to the commissioners, marked Exhibit No. 18, is the statement of all cargoes purchased and shipped by my firm to A. F. Smith & Co., of Oswego.

Defendants here read in evidence the statement, Exhibit No. 18, (G. I. J.,) of which the following is a copy:

EXHIBIT No. 18. (G. I. J.)

Date purchase. *Invoice of George I. Jones & Co. to A. F. Smith & Co.*

1869. Schooner Cortez.—Date invoice, 22d May.

May 19, 17,850 bushels No. 2 wheat, (spring.) Amount of invoice..... 20,898 05

Against which sum we draw at sight.

Consigned a/c D. Ferguson, cashier, or order, care National City Bank, Oswego.

Schooner Jennie Mullen.—Date invoice, 14th June.

June 11 & 12, 12,500 bushels No. 2 wheat, (spring.) Amount of invoice..... 14,625 07

Against which we drew—

June 14, on demand.....	1,875 07	
" 11, at 30 days date.....	6,375	
" 11, at 45 " "	6,375	14,625 07

Consigned a/c D. Ferguson, cashier, or order, care Merchants' Bank of Watertown, at Oswego, N. Y.

30 Schooner Trinidad.—Date invoice, 31st July.

July 29 and 30, 18,500 bushels No. 2 wheat. Amount of invoice..... 25,995 53

Against which we drew—

July 31st, on demand.....	2,955 03	
July 29th, at 30 days date.....	11,500	
" 29th, at 45 " "	11,500	
Payable at Merchants' Bank of Watertown, B. L. attached.....		25,995 53

Consigned a/c D. Ferguson, cashier, or order, care Merchants' Bank of Watertown, at Oswego, N. Y.

Schooner Grenada.—Date invoice, August 12th.

August 9 and 10, 14,500 bushels No. 1 wheat. Amount of invoice..... 23,167 00

Against which we drew—

August 12, on demand	2,517
August 10, at 30 days date	10,325
" 10, at 45 " "	10,325
Payable at Merchants' Bank of Watertown, N. Y., B. L. attached	23,167 00

Consigned a/c D. Ferguson, cashier, or order, care Merchants' Bank, Watertown, at Oswego, N. Y.

Redirect examination, read by plaintiffs:

Q. Were the several drafts mentioned in Exhibit No. 18 paid at maturity?

A. Yes.

Q. Have you exhibited to the counsel for the defendant on this your examination your letter-book containing your firm's entire correspondence with A. F. Smith & Co. in relation to the two cargoes in question?

A. Yes.

Q. Did the plaintiff in this suit ever see the letters or invoices sent by your firm to A. F. Smith & Co., of Oswego?

A. No.

Q. Do you know, of your own knowledge, who were proprietors of the Corn Exchange elevator at the date of the discount of your drafts attached to the bills of lading of the schooners Gerritt Smith and Atmosphere?

A. No.

Q. Do the letter-heads of the letters of A. F. Smith & Co. use the words "Proprietors of the Corn Exchange elevator?"

A. Yes.

Q. Did you know, then, from that letter-head that A. F. Smith & Co. claimed to be proprietors of the Corn Exchange elevator?

A. Yes.

Q. Was that one of the sources of your information?

A. Yes.

Q. Do you know that Mott or De Wolf had any interest in the said elevator at the time of the discount of the drafts before mentioned?

31 A. We knew nothing positive about it.

Q. Did the plaintiff in this suit ever, to your knowledge, see the letters marked Exhibits Nos. 10, 11, 12, and 13?

A. It is possible we may have shown Nos. 10 and 12 to the plaintiff, but cannot say positively.

Q. Have you any recollection of having exhibited either of those letters to the plaintiff?

A. I have not.

Q. In the statement marked Exhibit No. 18, were bills of lading attached to the respective drafts mentioned therein?

A. Yes.

Q. Were the bills of lading in those cases consigned a/c D. Ferguson, cashier, or order, care Merchants' Bank, Watertown, at Oswego, N. Y.?

A. They all were, except one, which was consigned a/c D. Ferguson, cashier, care National City Bank, Oswego.

Q. Had your firm any knowledge of the place or warehouse in which the several cargoes mentioned in Exhibit No. 18 were stored on their arrival at Oswego?

A. No.

Q. Were any bills of lading, or copies thereof, forwarded by your firm in either of the shipments mentioned in Exhibit No. 18 to A. F. Smith & Co., of Oswego?

A. No.

Recross-examination:

Q. Did your firm give the plaintiff any directions, or did you express any wish, where the two cargoes of the Gerritt Smith or Atmosphere, or either of them, should go upon their arrival at Oswego?

A. No.

Q. Why do you say that possibly the letter of A. F. Smith & Co. to your firm of September 25, marked Exhibit No. 12, may have been shown to plaintiff?

A. We may have wished to show to Mr. Ferguson the clause explaining why Smith desired drafts drawn through the Merchants' Bank of Watertown, N. Y.

GEORGE I. JONES.

Counsel for plaintiff reads in evidence deposition of Joseph B. Oliver, of said city of Milwaukee, taken at Milwaukee on the 25th day of February, A. D. 1870, before Joseph Colt, U. S. commissioner.

JOSEPH B. OLIVER, being duly sworn, doth depose and say: My name is Joseph B. Oliver. I am 30 years of age. Reside in Milwaukee, Wis. I know the plaintiff in this suit. I am one of the firm of Oliver & Hart, general commission merchants, doing business in the city of Milwaukee. The plaintiff does business in the city of Milwaukee, Wisconsin. The firm of Oliver & Hart loaded, or directed to be loaded, on board the sch'r Tho's Parsons, the latter part of September, 1869, eighteen thousand seven hundred and fifty-four $\frac{5}{6}\frac{0}{0}$ bushels No. 2 Milwaukee spring wheat. My firm received a bill of lading of that wheat from the captain of said vessel. We received three bills of lading—an
32 original, a duplicate, and a triplicate. My firm attached the original bill of lading to certain drafts drawn by my firm on A. F. Smith & Co., of Oswego. There were two drafts, one payable at sight and one payable twenty days after date. The time-draft was for $19,462; the sight-draft was for $3,750. We sold the sight-draft and bill of lading to the plaintiff. The bank discounted the drafts and placed the proceeds to the credit of my firm on the 22d September, 1869. The wheat that we ordered on board said vessel was purchased in Milwaukee, by my firm, September 20th and 21st, 1869. We insured the cargo, and delivered the certificate of insurance to the plaintiff at the time we delivered the drafts and bill of lading. That wheat was loaded aboard said vessel from the elevator of Angus Smith & Co., in Milwaukee. The sight-draft was paid; the time-draft is unpaid.

Cross-examination by defendants' counsel:

Question. Produce all letters and telegrams from A. F. Smith & Co. pertaining to this cargo.

Answer. I produce two telegrams and two letters, which are all the telegrams and letters from A. F. Smith & Co. pertaining to this cargo.

Then the counsel for defendants read the two telegrams and two letters referred to in above answer, marked Exhibits Nos. 1, 2, 3, and 4, (O. & H.,) as follows, in order of dates:

EXHIBIT No. 4. (O. & H.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.]

OSWEGO, N. Y., *September 15th*, 1869.

MESSRS. OLIVER & HART, MILWAUKEE:

GENTLEMEN: We want a cargo or two of wheat for our local trade, and, though prices may be lower when the movement of the crop becomes more active, still, any decline is likely to be counteracted, partially at least, by advance in freights. We therefore think it may be as well to supply our immediate needs at once. If you can draw, say st. for margin, balance 30 and 45 days, through Merchants' Bank, Watertown, N. Y., you may buy and ship, on receipt, a cargo choice 1 wheat. You understand that our home-trade requires a little time, and we desire drafts sent through Watertown, as we keep an a/c there, and, a large portion of our trade being in that section, very many of our collections are made there. It is, therefore, more convenient for ourselves and customers. Please advise by mail what you can do and oblige. We are at all times ready to pay st. on any consignments you may favor us with.

Yours, truly,

A. F. SMITH & CO.

EXHIBIT No. 1. (O. & H.)

Dated Oswego, N. Y., 16, 1869. Received at Mil. Sep. 16.

To OLIVER & HART:

Buy cargo choice No. two, (2.) Draw twenty (20) cents sight; balance 20 days. Merchants' Bank, Watertown. This instead of order by letter.

A. F. SMITH & CO.

33 EXHIBIT No. 2. (O. & H.)

(Telegram.)

Dated Oswego, 20, 1869. Received at Milw. Sept. 20.

To OLIVER & HART:

Draw all on bank as directed.

A. F. SMITH & CO.

EXHIBIT No. 3. (O. & H.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 25, 1869.

Messrs. OLIVER & HART,
Milwaukee, Wis.:

GENTS: Yours of the 21st and 22d both here, and noted. The drafts are not here yet, but will be honored on presentation, &c. We don't understand why you drew at twenty (20) instead of thirty (30) days, as we requested. We can send any quantity at 30 days. Some of your neighbors draw 30 and 45 days, and none less than 30. However, it

will make no particular difference in this instance. We are taking considerable for other parties, and money is very close here. You and they believe in wheat for shipment, but thus far it looks dangerous after purchase. Each time keep us posted. Should we require, can't you draw say 20c. sight, and 30 and 45 for a cargo or less?

Yours, truly,

A. F. S. & CO.

Q. Please produce invoice sent to A. F. Smith & Co. of the cargo in question, and also all letters and telegrams accompanying the same, from your firm to them in any way relating to the purchase and shipment of said cargo.

A. I here produce three telegrams and copies of three letters, and copy of the invoice, which are all the telegrams and letters from my firm to A. F. Smith & Co. relating to said cargo. The invoice accompanied our letter of 22d September, 1869, and was mailed that day.

Counsel for defendants here read the three telegrams, marked respectively Exhibits Nos. 5, 6, and 7, O. & H; the invoice of the cargo of the Thomas Parsons, marked Exhibit No. 8, O. & H.; and copies letters, marked Exhibits 9, 10, and 11, O. & H., as follows:

EXHIBIT No. 5. (O. & H.)

(Telegram.)

MIL., *Sept.* 18*th*, 1869.

A. F. SMITH & CO., *Oswego, N. Y.:*

Can place one cargo third, sight, thirty days, No. one (1) prime, twenty-four half, (24½.) Will commence buying.

OLIVER & HART.

34 EXHIBIT No. 6. (O. & H.)

(Telegram.)

MILWAUKEE, *Sept.* 20*th*, 1869.

A. F. SMITH & CO., *Oswego, N. Y.:*

Bought fifteen thousand (15,000) eighteen half (18½) after vessel. Draw as you desired. Shall we draw twenty (20) margins on you or bank?

OLIVER & HART.

EXHIBIT No. 9. (O. & H.)

(Copy.)

[Office of Oliver & Hart, general commission merchants, Chamber of Commerce building.]

MILWAUKEE, *Sept.* 20*th*, 1869.

Mess. A. F. SMITH & CO.:

GENT'N: Your favor 15th inst. at hand on Saturday, and your several t'ms all understood. We tel'd you purchase of 15,000 No. 2 @ 1.18½, and made inquiry whether to draw on you for sight margins or bank, as your tel'm and letter did not expressly state. We have your reply, and will draw as you direct. There were one or two cargoes bought this morning, and the market was very firm and quite active, at

1.18½ & ⅝; but at the close of morning board Liverpool came in 1d. lower, and our market eased off to 1.17, closing strong, with some demand for shipment. We are now after vessel, trying to charter at 12 c., and shall advise you by wires of what we do. We think wheat will now pay well to ship.

Y'r f'ds,

OLIVER & HART.

EXHIBIT No. 7. (O. & H.)

(Telegram.)

MILWAUKEE, *Sept.* 21*st*, 1869.

A. F. SMITH & Co., *Oswego, N. Y.:*

Chartered Lillie Parsons, twelve, (12.) Bought thirty-seven hundred (3,700) sixteen quarter, (16¼.)

OLIVER & HART.

EXHIBIT No. 10. (O. & H.)

[Office of Oliver & Hart, general commission merchants, Chamber of Commerce buildings.]

MILWAUKEE, *Sept.* 21, 1869.

Mess. A. F. SMITH & Co.:

GENT'N: We have none of your est'd favors to answer. We chartered the Thos. Parsons at 12c., and bought 3,700 more No. 2 @ 1.16¼, 35 to fill up. There was a good demand early in the morning for shipment; but soon after Liverpool reported 3d. lower, and this caused almost a panic, and sold down to 1.15½. We hope to get the Parsons out to-night. We wired you the name of the vessel as Lillie Parsons; should have been Thomas Parsons. Wheat looks cheap to us.

Y'r f'ds,

OLIVER & HART.

EXHIBIT No. 11. (O. & H.)

[Office of Oliver & Hart, general commission merchants, Chamber of Commerce building.]

MILWAUKEE, *Sept.* 22*d*, 1869.

Mess. A. F. SMITH & Co., *Oswego:*

GENTLEMEN: We have this day sighted on you, thro' Merchants' Bank, Watertown, $3,750, and our 20 dd., $19,462.74, of which draft we have advised the bank by this mail. We have to quote market dull @ 1.15¼ to ½ No. 2, & 1.21 No. 1, in demand, and scarce. We fear large amounts of wheat that would have made No. 1 have been damaged by wet and the present difference.

Yours, very truly,

OLIVER & HART.

EXHIBIT No. 8. (O. & H.)

Invoice of cargo schooner Parsons sent with foregoing letter of Sept. 22*d*, 1869.

Ac. purchase and shipment of 18,754$\frac{56}{60}$ bush. No. 2 wheat, per schr. Thos. Parsons, for ac. Messrs. A. F. Smith & Co., Oswego, by Oliver & Hart.

1869.					
Sep. 20, bot.	14, 804 50/60	No. 2, @ 1.18½		17,543	70
" 21, "	3,700	" @ 1.16¼		4,301	25
" " "	250	" @ 1.17		292	59
	18, 754 50/60			22,137	45

CHARGES.

Storage, 2 c	375	11
Inspection, 5⁶³. Weighing, 2⁸¹	8	44
Insurance until shipped	26	25
Marine ins., 27,000, @ 60 c	162	00
Interest until shipped	17	17
Dis. on sight-draft, ½ p. c	18	75
" " time, ¾ " 1.45⁹⁴	155	69
Stamps 9⁷⁵		
Int. on st. draft, time, 23 days	124	34
Commissions, 1c. per bush	187	55

36 CREDIT.

By our sight-draft on you for (Merchants' Bank, Watertown)	3,750	00
By our time-draft on you for (Merchants' Bank, Watertown)	19,462	74
	23,212 74	23,212 74

(E. & O. E.)

OLIVER & HART.

MILWAUKEE, *Sept.* 22, 1869.

Q. At the time your firm obtained discount from the plaintiff of the time-draft referred to did you exhibit to the plaintiff any of the above-named letters or telegrams?

A. We did.

Q. Previous to the suspension of A. F. Smith & Co. did you know where the cargo in question was unloaded and stored at Oswego?

A. We did not.

Q. Did your firm make any inquiries in that regard?

A. No.

Q. Did your firm receive any notice of the arrival of the cargo in question at Oswego?

A. No.

Q. Did your firm, or did any one else at Milwaukee, so far as you know, pay any portion of the lake freight of said cargo?

A. No.

Q. At the time you purchased the cargo in question did you know that A. F. Smith & Co. were proprietors, or part proprietors, of an elevator at Oswego?

A. No.

Redirect examination:

Q. Which did you present to the plaintiff—the telegrams or the letters?

A. One telegram and one letter.

Q. Did you present them to the plaintiff?
A. Yes.
Q. When, or about when?
A. At the time they were received.
Q. Are you certain that you showed either that letter or telegrams to the plaintiff; or did you simply state to the plaintiff the contents of that letter or that telegram?
A. I think I showed the letter and the telegram to the plaintiff.
Q. State which letter and telegram you exhibited to the plaintiff.
A. The telegram dated Sept. 18, 1869, marked "Exhibit No. 1," and the letter dated Sept. 15, 1869, marked "Exhibit No. 4."
Q. Was there any particular clause in the letters; and, if so, what clause, that you specially called the attention of the plaintiff to?
A. To the clause referring to drawing sight-draft for margins, and to the balance at thirty and forty-five days through Merchants' Bank, Watertown.

37 The defendants' counsel then read the residue of the direct and the recross as follows:

Q. Did you leave the letter with the plaintiff, or simply exhibit it to the plaintiff?
A. We merely showed the letter to the plaintiff.
Q. Was the attention of the plaintiff particularly called to that portion of the letter referred to?
A. Yes.
Q. State whether you passed to plaintiff the letter, or whether you held the letter in your hand, calling plaintiff's attention to that portion of the letter.
A. I think I held it in my hand.

Recross-examined by defendants' counsel:

Q. In what place did you exhibit the letter and telegram to plaintiff?
A. At their office.
Q. In what portion of the office?
A. In plaintiff's private office?
Q. Were you sitting or standing?
A. Standing.
Q. What hour in the day?
A. I think between 2 and 3 o'clock.
Q. Who was in the room?
A. The bank clerks, at their posts.
Q. How many of them?
A. Seven or eight, I think.
Q. Which, seven or eight?
A. I could not say whether seven or eight.
Q. To whom did you show the letter?
A. To Mr. Ferguson.
Q. Was he sitting or standing?
A. Standing.
Q. Did he have his hat on or off?
A. I think off.
Q. Which side of him were you?
A. Rather in front of him.
Q. You swear that you held the letter in your hand all the time, do you?
A. I think I did.
Q. Might he have not taken it in his hand?

A. Possibly.

Q. Is it not really impossible for you to speak with certainty upon that subject, the lapse of so much time?

A. I think not.

Q. Am I to understand you as saying that you can speak with certainty as to the fact whether you held the letter in your hand all the time?

A. I think I can.

Q. What was there to impress that fact upon your mind?

A. The fact that Mr. Ferguson is not very far-sighted, and the writing is, perhaps, a little peculiar.

38 Q. Was that the reason why you are confident that you held the letter in your hand?

A. Partly so.

Q. State any other reason.

A. My recollection.

Q. Is that all?

A. I think so.

Q. Then it is the fact, is it not, that the only reason you can give why you should hold the letter in your own hand was Mr. Ferguson's imperfection of vision?

A. No.

Q. I again ask you, give the additional reasons.

A. As a rule I generally do it.

Q. Have you any other reason to add confirmatory of your recollection?

A. I cannot, at the moment, give any other. I do not remember any other reason.

Q. Please explain how holding the letter in your own hand would aid Mr. Ferguson's vision?

A. I cannot say how it would aid his vision.

Q. Would holding the letter in your own hand render illegible writing any clearer to Mr. Ferguson?

A. I cannot say that it would.

Q. Then do not the facts of the peculiar handwriting of the letter and Mr. Ferguson's bad eyesight both fail as a reason why you should hold the letter in your own hand when exhibing it to him?

A. No.

Q. At the time had you any reason to suppose that it would ever be of the slightest importance whether you held the letter in your own hand or delivered it to Mr. Ferguson?

A. I did not?

Q. Then you had no special reason for remembering the circumstances of your exhibition of the letter, had you?

A. No.

Q. Do you think you held it so close to Ferguson's eyes that, bad as they are, he could see the clause in said letter to which you have referred?

A. I don't think I did.

Q. How, then, did he ascertain what it was?

A. I read it to him.

Q. Have your firm, previous to the purchase of the cargo in question, bought cargoes for A. F. Smith & Co., and procured discount of drafts upon them? If yea, when, how many, and of whom have such discounts been obtained?

A. We have, and I here produce a statement of the same.

(Said statement, marked Exhibit No. 12, O. & H., was here read in evidence by defendants' counsel, as follows :)

39 EXHIBIT No. 12 (O. & H.)—JOSEPH COLT, SPECIAL COMMISSIONER.

[Office of Oliver & Hart, general commission merchants, Chamber of Commerce building.]

MILWAUKEE, *Feb'y 25th*, 1870.

Statement of drafts and form of consignments to A. F. Smith & Co., Oswego, N. Y.

1868.			
July 2d.	Sight-draft....	$15,253 34	Ac. and orders, T. L. Baker, care 1st Nat'l Bank, Oswego, N. Y., 16,000 bu. No. 1 wheat, per sch'r C. H. Walker.
	30 d. draft	$16,000	
Sept. 14th.	S't-d'ft	$5,960 88	Ac. and order, D. Ferguson, cash'r, care 1st Nat'l Bank, Oswego, N. Y., 12,415 bus. No. 1 wheat, per sch'r Thomas Parsons.
	15 d. d'ft ...	$6,000	
	30 d. d'ft ...	$10,000	
Oct. 27th.	S't d'fts	$6,720 29	Ac. and order, D. Ferguson, cash'r, care 1st Nat'l Bank, Oswego, N. Y., 15,800 bus. No. 1 wheat, per sch'r Kate Kelly.
	40 d. d'f's ...	$16,000	
Nov. 19th.	S't d'f's.....	$6,711 08	Ac. and order, D. Ferguson, cash'r, 15,000 bus. No. 1 wheat, per brig Saxon.
	60 d. d'fts...	$14,000	
Sept. 17.	S't d'fts	$3,283 18	Ac. and order, Marshall & Ilsley, care 1st Nat'l Bank, Oswego, N. Y., 7,000 bus. No. 1 wheat, per sch'r White Squall.
	15 d. d'fts.....	$3,000	
	25 d. d'fts	$6,000	
1869.			
Sept. 22d.	S't d'fts	$3,750	Ac. and order, D. Ferguson, cash'r, 18,754 $\frac{50}{60}$ bus. No. 2 wheat, per sch'r Tho's Parsons.
	20 d. d'fts ...	$19,462 74	

The witness continued :

Where the name of D. Ferguson appears in the statement, the discount was obtained from the plaintiff, and where the name of T. L. Baker appears the discount was obtained from the Milwaukee National Bank of Wisconsin. One cargo in the statement the drafts were discounted by Marshall & Ilsley, bankers, in the city of Milwaukee.

Plaintiff's counsel here read the deposition of William C. Harry, taken before Samuel E. Dale, a notary public in and for the city of Chicago, on the 27th day of September, A. D. 1870, as follows :

WILLIAM C. HARRY, the said witness, being by me carefully examined, cautioned, and duly sworn to testify the whole truth, says :

My name is William C. Harry. I reside at Pillow Point, Jefferson County, New York, more than one hundred miles from the city of New York; aged 36 years. I am a sailor. I am now in Chicago, Illinois.

I expect to leave soon to go with my vessel. I am waiting for a
40 cargo. I was captain of the schooner Thomas Parsons in September, 1869. The Thomas Parsons was in Milwaukee, Wisconsin, on the 22d September, 1869. The schooner Thomas Parsons took on

board at Milwaukee, on or about that day, a cargo of 18,754$\frac{50}{60}$ bushels No. 2 Milwaukee spring wheat. That wheat was taken on board from the elevator of Angus Smith & Co. I signed two or three bills of lading for the cargo. I think they were in triplicates.

Q. Look upon the bill of lading now shown you, marked on the back Exhibit No. 1, F. B., and state whether it is one of the bills of lading signed by you for said cargo of wheat.

A. It is. The signature is mine.

Q. What did you do with that cargo of wheat?

A. I transported it from Milwaukee to Oswego, and delivered it to A. F. Smith & Co., at Oswego.

Q. At what elevator was it delivered at Oswego?

A. I think it was the Corn Exchange elevator.

Q. Who paid the freight?

A. A. F. Smith & Co.

Q. At or about what date did you arrive at Oswego and deliver the wheat?

A. About the 2d of October, 1869.

Q. Did you deliver all the wheat in Oswego which you took on board at Milwaukee?

A. I delivered all the wheat I took on board.

Q. Did you report the arrival of your vessel at the custom-house at Oswego?

A. I reported to Captain Bundy, at his house. He was collector at Oswego.

Q. How did you report the cargo?

A. I reported according to my clearances. I don't recollect how it was described.

Q. Who chartered the Thomas Parsons for this cargo?

A. Fitzgerald & Co., of Milwaukee. They are vessel-brokers at Milwaukee.

Q. Were they the agents of the Thomas Parsons?

A. They were.

Q. Do you know with whom they made the charter-party?

A. With Oliver & Hart, I suppose.

Cross-examination:

Question put at the request of defendants' counsel:

Q. Did you receive any order for the delivery of the cargo from any person in Milwaukee?

A. Not any more than the bills of lading, care of A. F. Smith & Co., Oswego. There was an order written in lead-pencil on the captain's bill of lading by Oliver & Hart, substantially as follows: to call on A. F. Smith & Co., of Oswego, or in care of A. F. Smith & Co., Oswego; I can't say which.

Q. What did you do on your arrival at Oswego with the cargo?

A. When I got to Oswego I asked A. F. Smith himself where I could find Mr. Ferguson. He told me that Ferguson was out of town; that he,
Smith, had an order to deliver my cargo to him. He did not
41 show me the order, but he said he had it. I told him I wanted
some money to pay my sailors, and he said I could have all the money wanted, and he gave me $300 or $400.

Q. Did you take a receipt for the cargo on your bill of lading?

A. Yes, sir.

Q. Where is your bill of lading?

A. I gave it to the owner of the vessel, Hosea Rogers, of Rochester I have not seen it since I gave it to him.

Q. Where were those bills of lading signed?

A. At the office of Oliver & Hart, Milwaukee. They were all signed at the same time.

Q. You have no other order or direction from Milwaukee than what you have stated?

A. No, sir.

Q. You delivered the cargo on the representation of A. F. Smith that he had an order from Ferguson?

A. Yes, sir.

Q. What order, if any, did you have for the delivery of the cargo?

A. No other order than A. F. Smith's representation.

Q. Did Smith show you an order from the Merchants' Bank?

A. He did not.

W. C. HARRY.

Subscribed and sworn to before me this 27th day of September, 1870.

SAMUEL E. DALE,
Notary Public, Chicago, Ill.

Plaintiff's counsel here read in evidence the following letter of Hosea Rogers, the owner of the Thomas Parsons, who is referred to in the deposition of Captain Harry, under stipulation of defendants' attorney to admit the statements in the letter with the same effect as if Hosea Rogers had testified to them under a commission duly executed, (stipulation dated October 24, 1870,) as follows:

ROCHESTER, NEW YORK, 1 *Oct.*, 1870.

Messrs. FINCHES, LYNDE & MILLER:

GENTS: Yours of the 28th just received, and in answer have to say, the endorsement on the bill of lading to which you refer is in these words: "Call on A. F. Smith & Co., Oswego, N. Y.," and is on the left-hand corner, on the face of the bill. The order to deliver the cargo is with Mr. Perry, of Oswego, who is attorney in some cases there.

Yours, &c.,

HOSEA ROGERS.

This bill is dated 2 Sept., 1869, and may be a mistake in the date It calls for 18,756$\frac{50}{100}$ bushels of wheat. H. R.

Counsel for plaintiff next read in evidence the deposition of Albertus Perry, of Oswego, taken before Alfred B. Getty, United States commissioner, November 2, 1870.

OSWEGO, *November* 2, 1870.

ALBERTUS PERRY, the witness aforesaid, having been duly sworn as aforesaid, did depose and say as follows, to wit: I reside in the city of Oswego, and am an attorney and counsellor of the supreme court.
42 My age is forty-six years. I reside three hundred miles and upwards from the city of New York. I am counsel for Hosea Rogers, who, in September, 1869, was owner, or part owner, of the schooner Thomas Parsons. As such counsel I have in my possession an order directed to W. C. Harry, master of the schooner Thomas Parsons, at Oswego, N. Y., dated Watertown, N. Y., Sept. 27, 1869, signed J. F. Moffitt, cashier. The said order is in the words and figures following, to wit:

NORRIS WINSLOW, *Banker.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Sept. 27th, 1869.

W. C. HARRY, Esq.,
Master Schooner Tho's Parsons, Oswego, N. Y.

DEAR SIR: Deliver your cargo of 18,754$\frac{50}{60}$ bush. No. 2 Milwaukee spring wheat to the Corn Exchange elevator, Oswego, N, Y., for ac. of D. Ferguson, esq., cash., subject to my order.

Yours, resp'y,

J. F. MOFFITT, *Cash.*

The words "Norris Winslow, banker," "J. F. Moffitt, cashier," "Merchants' Bank," and "Watertown, N. Y.," in said order, are printed. The rest of the order is in writing, and, I think, in the handwriting of J. F. Moffitt, who was the cashier of the Merchants' Bank, Watertown, in 1869.

I decline to attach said order to this my deposition, because it is in my hands as counsel, and I have no authority to part with it.

ALBERTUS PERRY.

Subscribed and sworn to before me this 2d day of November, 1870.

ALFRED B. GETTY,
U. S. Commissioner.

Before the reading of the order defendants' counsel objected to its admissibility in evidence as or if an order importing a conditional delivery as unauthorized by the arrangement under which the wheat was bought and shipped at Milwaukee; also as not admissable to affect these defendants as third parties by subjecting it to any conditions. The judge overruled the objections, and allowed it to be read in evidence.

The defendant' excepted to his decision, and the same was read in evidence by plaintiff's counsel.

The plaintiff's counsel here read the deposition of Joseph Anderson, taken ex parte, on the 1st day of November, A. D. 1870, before James D. Cleveland, U. S. commissioner, in the city of Cleveland, as follows:

And the said Joseph Anderson, being about the age of forty years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of con-
43 troversy aforesaid, I did carefully examine the said Joseph Anderson, and he did thereupon depose, testify, and say as follows:

I reside at Milan, Ohio, and am by occupation master of vessel.

Q. 1. What was your occupation in September, 1869?

A. I was master of a vessel—the schooner Atmosphere.

Q. 2. Was that vessel at Milwaukee in the latter part of September, 1869?

A. Yes.

Q. 3. Look upon the bill of lading now shown you, marked on back "Exhibit No. 6, F. B." dated Milwaukee, Sept. 23, 1869, and state whether you signed it.

A. I did. The signature is mine.

Q. 4. Was the cargo on board when you signed it?

A. Yes, sir.

Q. 5. Who chartered the schooner Atmosphere for this cargo?

A. R. P. Fitzgerald & Co., of Milwaukee.

Q. 6. Did you have any conversation with the shippers, Geo. I. Jones & Co., as to the delivery of the cargo?

A. Not as I recollect.

Q. 7. Did you have any conversation with Fitzgerald & Co. as to the delivery of the cargo?

A. No, sir.

Q. 8. Did you have any order or direction from any one in Milwaukee as to the delivery, except as specified in the bill of lading?

A. No, sir.

Q. 9. How many bills of lading did you sign?

A. I think that I signed three, but cannot be positive; think there must have been two or three.

Q. 10. Did you retain a bill of lading signed by Geo. I. Jones & Co. or R. P. Fitzgerald & Co.?

A. I did get one signed by the shipper.

Q. 11. What did you do with the cargo of wheat you received under said bill of lading?

A. I took it to Oswego, unloaded it at the Corn Exchange elevator in that city, subject to that order of the cashier of the Watertown Bank.

Q. 12. Who paid, and how was the freight paid?

A. It was paid by A. F. Smith; one thousand dollars in his draft on New York, and balance in currency.

Q. 13. Was the draft paid?

A. No, sir; not to my knowledge. It was not paid as late as thirty-two days ago.

Q. 14. Did you report the arrival of your cargo in the custom-house, at Oswego?

A. Yes; I reported to the collector.

Q. 15. How did you describe the cargo in the report?

A. The cargo was described in that report as it was in the bill of lading.

Q. 16. Did you obtain a receipt for the delivery of the cargo, and from whom?

A. Yes; I got a receipt for the cargo from A. F. Smith & Co.

44 Q. 17. Had you an order for the delivery of the cargo?

A. Yes, sir; I had such a paper.

Q. 18. Have you that order now?

A. No, sir.

Q. 19. Do you know where it is?

A. No, sir; I do not.

Q. 20. Do you recollect the contents of the order?

A. Not word for word; but I can give the substance of it. It was an order to deliver the cargo to the Corn Exchange elevator, subject to the order of the Merchants' Bank, at Watertown.

Q. 21. From whom did you get the order?

A. From A. F. Smith, personally. He delivered it to me at Oswego.

Q. 22. Who settled with you the account for the freight?

A. I do not recollect his name, but he was in the office of A. F. Smith, adjoining the elevator.

Q. 23. Do you recollect the date you delivered the cargo?

A. It was along in the fore part of October, 1869.

Q. 24. Did you tally in any portion of the cargo into the elevator, or superintend the tallying?

A. No, sir; except, perhaps, at meal-times, when I may have relieved the mate.

Q. 25. Who attended to the tallying on the part of the vessel?

A. The mate.

Q. 26. Did you have more then one order for the delivery of the cargo?

A. No, sir.

Q. 27. Was your receipt for the cargo signed on the back of the bill of lading?

A. It was receipted on the back or face of my (the captain's) bill of lading.

Q. 28. Where is that bill of lading?

A. I do not know. After the season is closed the papers are delivered over to the owners.

JOSEPH ANDERSON.

Counsel for plaintiff reads in evidence the deposition of John F. Moffatt, taken before U. S. Commissioner Alfred B. Getty, at Oswego, 28th April, 1870, as follows:

JOHN F. MOFFATT, having been by me first cautioned and sworn as aforesaid, did depose and say as follows, to wit: My age is twenty-nine years. I reside at Watertown, New York. Watertown is two hundred and sixty miles from New York City. My business, in the month of September, 1869, was cashier of Norris Winslow's Bank, of Watertown, under the name of the Merchants' Bank. The place of business of that bank was Watertown. We had no president. It was a private bank, under the name "Norris Winslow, banker." That is the only bank known as the Merchants' Bank in Watertown, N. Y.

The Merchants' Bank received a letter, (here produced,) marked Exhibit No. No. 11, dated the 22d day of September, 1869, a copy of which is hereto attached, and marked Exhibit No. 11, on or about the 25th of September, 1869, from D. Ferguson, cashier of Wisconsin Marine
45 Fire Insurance Company, with drafts and bill of lading therein mentioned. The drafts were sent to A. F. Smith & Co. for acceptance. The $3,750 draft was paid, and the other draft of $19,462.14 was accepted.

The plaintiff's counsel here read said Exhibit No. 11, (A. B. G.,) of which Exhibit No. 2, attached to deposition of D. Ferguson is a copy, subject to the same objection by defendants' counsel as was made to the reading of said Ex. No. 2. The same ruling by the judge, and exception by defendant. (See ante, fo. .)

Q. Is the draft here shown you, and the certificate attached, marked Exhibit No. 2, F. B., the draft enclosed in said Exhibit No. 11?

A. It is the same draft.

(This draft is the same which is referred to in the deposition of D. Ferguson, and which is above therein set forth as Ex. No. 4.)

Q. Is the bill of lading marked Exhibit No. 1, F. B., with the endorsement on the back "Without recourse, D. Ferguson, C.," the bill of lading in said Exhibit No. 11?

A. I believe it to be the same.

(This bill of lading referred to, as marked Ex. No. 1, F. B., is the same mentioned and set forth in the foregoing deposition of D. Ferguson as Ex. No. 1.)

Q. Was the draft exhibited to you paid at maturity?

A. No, it was not. It was protested by me.

Q. Were the draft and bill of lading transmitted by you to Milwaukee, after protest, to the Wisconsin Marine Fire Insurance Company?

A. They were.

Q. In whose handwriting are the words A. F. Smith & Co. on the face of that draft?

A. I should say it was the handwriting of A. F. Smith.

Q. Was that draft returned to you after its acceptance by A. F. Smith & Co.?

A. It was.

Q. In whose custody was the paper marked "Exhibit No. 1, F. B.," from the time you received it until it was returned to Milwaukee?

A. It was in mine, as cashier of the bank.

Q. Did you make out and sign any order to be given to the captain of the Thomas Parsons for the delivery of the cargo?

A. I wrote an order addressed to the captain of the schooner Thomas Parsons. I have a copy of that order, and it is in my handwriting.

(The same was marked Exhibit No. 12, A. B. G., and an exact copy thereof is above set forth in the deposition of Albertus Perry, and the same was here read in evidence by plaintiff's counsel, subject to same objection. Ruling by the judge and exception by defendants as there noted.)

The Merchants' Bank received a letter, here produced, dated September 23, 1869, and marked Exhibit No. 13, A. B. G., on or about the 26th of September, 1869, from John Johnson, assistant cashier of Wis-
46 consin Marine Fire Insurance Company, enclosing a draft on A. F. Smith & Co. for $14,472.15, and also bill of lading of the schooner Atmosphere.

(The plaintiff's counsel here read Exhibit No. 13, A. B. G., of which Exhibit No. 9, mentioned and set forth above in the deposition of D. Ferguson, is a true copy, subject to the same objection, ruling, and exception by defendants' counsel as noted in respect to the reading of said Exhibit No. 9.)

The draft and certificate hereto annexed, and marked Exhibit No. 5, F. B., is the draft in the said letter, Exhibit No. 13.

(This draft here described, as marked Ex. No. 5, F. B., is the same as mentioned and set forth in deposition of D. Ferguson above as Ex. No. 10.)

That draft was sent to A. F. Smith & Co. for acceptance, and was accepted in the handwriting of A. F. Smith. The draft was not paid at maturity, and was protested for non-payment, and I protested it.

The bill of lading shown me, marked Exhibit No. 6, F. B., endorsed on the back, "Without recourse, D. Ferguson," is the bill, I believe, enclosed in the letter, Exhibit No. 13.

(This B. L. is same as mentioned and set forth above in deposition of D. Ferguson as Exhibit No. 11.)

I did make out an order for the delivery of that cargo. I have a copy of the order, and here produce it, to be annexed to the deposition.

Said order, marked Exhibit No. 14, A. B. G., was here read in evidence by plaintiff's counsel, under same objection, ruling, and exception by defendants' counsel as was taken as to the order in the deposition of Albertus Perry to Captain Harry, as follows:

EXHIBIT No. 14, A. B. G.

NORRIS WINSLOW, *Banker.* J. M. MOFFAT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Sept. 27, 1869.

J. ANDERSON, Esq.,
Master Schooner Atmosphere, Oswego, N. Y.:

D'R SIR: Please deliver your cargo of 14,857 bush. of No. 2 Mil.

spring wheat, in the Corn Ex. elevator, of Oswego, N. Y., for the account of D. Ferguson, cash., subject to the order of this bank.

Yours, truly,

J. F. MOFFATT.

The copy order is in my handwriting, all except the printed part thereof.

Q. How and to whom were the orders sent addressed to the captains of the several vessels for the delivery of the several cargoes?

A. They were sent by mail to the Corn Exchange elevator.

Q. Were any other papers or letters sent at or about the same time to the Corn Exchange elevator relating to the cargoes or drafts in question?

A. I think there were.

47 Q. State just how the business was done relating to these cargoes between you and A. F. Smith & Co., or the Corn Exchange elevator.

A. I think I have explained fully how the business was done.

Q. Were any letters written by any officer of the Merchants' Bank on the same day and in connection with the order addressed to the Corn Exchange elevator, or to A. F. Smith & Co.?

A. I think there was.

Q. What were they, and to whom written?

A. I cannot say whether the letters were addresed to A. F. Smith & Co., Corn Exchange elevator, or to the proprietors of the Corn Exchange elevator. I recollect the fact that the letters were written.

Q. How many letters were written in relation to each cargo, addressed as you have described?

A. I think there were two besides the order.

Q. The letters you have referred to, and the orders, were they or not, or how is the fact copied into the letter-book you have produced here?

A. I cannot say positively, but I think they were. I did not do the copying myself.

Q. Who wrote the letters?

A. I think I did in all those cases.

Q. By whose directions were they copied, and by whom?

A. I presume they were laid by me on the copying-desk, and were copied by one of our clerks. We have two clerks, and I cannot tell which one.

Q. Was it your custom to copy such letters in the regular course of business?

A. Yes. We intended to copy all letters of importance.

Q. Was the letter-book you produced here this morning the one in which all such letters were copied, and the only one?

A. It was.

Q. Are the copies missing from the letter-book the letters you have just described?

A. I presume they are, and I have no doubt they are.

Q. Were these letters addressed to either A. F. Smith & Co. or the Corn Exchange elevator?

A. They were either addressed to the Corn Exchange elevator, Oswego, N. Y., or to A. F. Smith & Co., proprietors of the Corn Exchange elevator, Oswego, N. Y., or to A. F. Smith & Co., Oswego, N. Y.

Q. You have stated in substance that you wrote those several letters,

addressed as you have stated, on the same day, in relation to each of the cargoes, and have described but two of the letters. Can you describe or state the contents of the third letter? State the contents thereof as near as you can.

A. To the best of my recollection the letter I wrote to the Corn Exchange elevator. I think in that letter I enclosed the order to the masters of the vessels. I think I stated the wheat was consigned to our bank by Fitch. I think I said the grain was to be held subject to the payment of the drafts, which I enclosed in another letter.

48 Q. Was there such a letter written by you accompanying each of the orders in question?

A. I think there was. I have no doubt that I wrote such a letter accompanying each order. I presume those letters were copied into the letter-book in the usual course of business. I suppose those letters are now missing in the letter-book, at least I cannot find them there. There are blanks in the letter-book corresponding to the missing letters.

Defendants' counsel read the cross-examination as follows:

I have been acquainted with A. F. Smith & Co. for three or four years.

Q. Do you know whether Mr. Winslow was acquainted with them for that length of time?

A. Yes, sir.

Q. Has Mr. Winslow's acquaintance with A. F. Smith & Co., and yours, during that time, been somewhat intimate?

A. Yes, sir.

Q. When Mr. Winslow and you have come to Oswego have you usually stopped at this house?

A. I cannot speak for Mr. Winslow. I can speak for myself. I don't know that Mr. Winslow has ever been at his house, and I have never been to his house until now, and have not been in the habit of stopping at his house when I came here.

Q. Have you or Mr. Winslow, when coming to Oswego, been in the habit of doing your writing at A. F. Smith & Co.'s office or counting-house; and, if so, to what extent?

A. I don't know anything about Mr. Winslow's being here. I have never been here at the same time, and have never done any writing in Mr. Smith's office. I was never there but once before now, and was not there then to exceed a minute in his office.

Q. Have A. F. Smith & Co. kept an account with the Merchants' Bank of Watertown; and, if so, for how long?

A. They have. Can't say just how long, but for three years certain.

Q. Did A. F. Smith & Co. keep an account with that bank before they came to Oswego?

A. They did, and they continued to keep an account with the Merchants' Bank after they came here.

Q. What was the business of A. F. Smith & Co. in 1868 and 1869?

A. They were dealers in grain.

Q. Did they have an elevator at Oswego?

A. They did; I suppose they did. They advertised to run an elevator—the Corn Exchange elevator.

Q. Were they also commission merchants for the sale of all kinds of grain?

A. I do not know whether they were or not, but they so advertised.

Q. Have you any idea of the extent of their transactions in grain, as to the amount of business they did?

A. Their transactions before 1869 were not so large as they were during 1869. During 1869 they were very large, I should think.

Q. Was there any account with your bank that was larger than that of A. F. Smith & Co.?

49 A. I could not tell without looking at our books; we have some nearly as large, if not larger.

Q. How many had you nearly as large?

A. We had one or two, certain, that were nearly as large, if not quite.

Q. Do you recollect the date of the stoppage of A. F. Smith & Co.?

A. I think it was on or about the 15th of October, 1869.

Q. Did you know of any suspension or stoppage before the 15th of October, 1869.

A. No, sir.

Q. How was the credit of A. F. Smith & Co. down to the time of the stoppage?

A. It was considered good by us, and was good with our bank at that time.

Q. When did your bank first receive consignments by bills of lading from western banks, with drafts on A. F. Smith & Co. for collection?

A. I think in the summer of 1868.

Q. Did they receive such consignments in 1868?

A. I think we did; that is my recollection.

Q. And did you receive such consignments by bills of lading, with drafts on A. F. Smith & Co. during 1869, prior to those consignments to which you have testified?

A. I think we did; that is my best recollection.

Q. Before these consignments by bills of lading, concerning which you have testified on your direct examination, had your bank received consignments by bills of lading for account of the National Exchange Bank of Milwaukee, or the Wisconsin Marine and Fire Insurance Company, with drafts enclosed on A. F. Smith & Co.; and, if so, how many in 1868 and 1869?

A. I am unable to answer the question. I believe that we did; certainly with the National Exchange Bank of Milwaukee. After examining our letter-book, I can say that we did receive consignments from both of those banks prior to that time.

Q. In those cases were the drafts paid by A. F. Smith & Co.?

A. I think they were.

Q. You testified to receipt of certificates of insurance in the enclosure you received from Milwaukee; when did the period of those certificates of insurance expire?

A. I suppose they covered the cargoes until delivered from on board of the vessel at Oswego. They are expressed "On cargo of the schooner, (naming it,) at and from Milwaukee to Oswego." This is so of all the certificates of insurance in respect to all those cargoes.

Q. In either of those cases testified to by you on your direct examination, was your bank put in funds by either of the banks consigning the cargo to you for the payment of freight or further insurance or other charges?

A. No, sir.

Q. At the time of the transmission of the order for the captain, your recollection, as you have testified on the direct examination, is, that another letter was written, directed and sent to A. F. Smith & Co.,

or A. F. Smith & Co., propietors of the Corn Exchange elevator,
50 or the Corn Exchange elevator. Is that correct as you have stated it?

A. It is.

Q. Is that your recollection now?

A. It is.

Q. You supposed this other letter was copied in the letter-book on the leaf which was torn out?

A. I did.

Q. Did this other letter, and the order for the captain, and the letter with the draft enclosed, constitute the whole transmission to Oswego of that date?

A. It did, with the drafts and inspector's certificate.

Q. What is that inspector's certificate?

A. The inspector, appointed by the board of trade, at the place of shipment, certifies to the quality or kind of wheat, and this is his certificate. The form of it is substantially as follows:

"CHAMBER OF COMMERCE,
"*Milwaukee*, (the date.)

"I hereby certify I have inspected the cargo this day put on the bushels No. wheat, according to the present standard adopted by the chamber of commerce of the city of Milwaukee.

"*Grain Inspector.*"

[Seal of chamber of commerce of Milwaukee.]

Q. Were the above papers transmitted to Oswego by the Merchants' Bank before the arrival, or before the vessel was due at Oswego?

A. I cannot say.

Q. Don't you know the usual time of passage by vessel from Milwaukee to Oswego?

A. I suppose it to be about two weeks.

Q. Well, then, were not those papers transmitted to Oswego before the arrival of the vessel could be expected, in due course, with advices before you of shipment on board at Milwaukee, on the first of September, under bill of lading dated September 1st?

A. Yes, sir. When my previous answer was made I had not in mind the date of the bill of lading.

Q. The next thing in due course would be the receipt of the drafts accepted from Oswego?

A. It would.

Q. How was the sight-draft paid in this case?

A. I cannot tell how this was paid in this case. There are two ways in which they are paid. Sometimes they accept the sight-drafts, returned them to the bank, and they were charged to the account. In other cases, they retain the sight-drafts, and sent their check upon the Merchants' Bank for the payment of it.

Q. Would the next thing be, so far as the bank gave personal attention to the transaction, the presenting for payment, or the receipt of payment, of the time-draft?

A. It would.

Q. In what manner were these time-drafts presented for payment?

A. They were presented at the counter of the Merchants' Bank, where they were made payable.

51 Q. Was the course of business in reference to the other consignments to which you have testified on your direct, by the Grenada, by the Corsican, by the Gerrit Smith, by the Thomas Parsons, and the Atmosphere, substantially the same?

A. Yes, sir.

Q. Is the letter, Exhibit E, a copy of a letter dated September 27th, 1869, and which cpyy is hereto annexed, and marked Exhibit E, the letter in which the drafts received by you in Exhibit No. 11 and Exhibit No. 13 were enclosed to A. F. Smith & Co., at Oswego, for acceptance and return?

A. Yes.

Defendants' counsel here read Exhibit E, as follows:

EXHIBIT E., A. B. G.

NORRIS WINSLOW, *Banker.* J. F. MOFFATT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., September 27th, 1869.

A. F. SMITH & Co.,
Oswego, N. Y.:

DEAR SIRS: I enclose for acceptance and return, the following drafts, viz:

G. I. Jones & Co. on you, Oct. 26th	$14,472 15
Oliver & Hart on you, st.	3,750 00
Oliver & Hart on you, Oct. 15th	19,462 74

I also return for acceptance (what you omitted before) the following:

G. I. Jones & Co. on you, Oct. 24th	$16,315 20

Also inspector's c't'f's and c't'f. of weight.

Yours, respectfully,

J. F. MOFFATT, *Cashier.*

Q. Did orders for the masters of the Parsons and Atmosphere for the delivery of the cargoes, respectively, go forward to Oswego on the same date of the letter of September 27th, 1869, to the same parties, and to the same address, as the orders in the former cases, together, as you believe, with a letter, of which a copy was made on a leaf of the bank's letter-book, which was torn out?

A. They did. I think there were two letters; one relating to each vessel.

Q. Do you now know that A. F. Smith & Co., the proprietors of the Corn Exchange elevator, were the same A. F. Smith & Co. upon whom the drafts were drawn?

A. I now believe that they were.

Q. Did you direct A. F. Smith & Co. to effect insurance upon those cargoes after being unloaded from the vessels?

A. I did not.

Q. Did you call upon them for or receive warehouse receipts for any of those consignments?

A. I did not.

Q. Did your bank make any inquiry, to your knowledge, after any of those consignments, after they were unloaded, until after A. F. Smith & Co. stopped payment?

52 A. It did not.

Q. In the cases of consignments, by bill of lading, for account

the National Exchange Bank, or the Wisconsin Marine Fire Insurance Company, to the care of your bank, before these consignments, which you have testified to on your direct examination, did your bank make inquiry, after the grain had been unloaded into the warehouse, for the grain?

A. Not to my knowledge.

The counsel for plaintiff then read from the cross-examination of this witness as follows:

Q. Did your bank have correspondence with A. F. Smith & Co. during the time they kept their account with your bank?

A. It did.

Q. Did your bank receive letters from them during the time they kept an account there?

A. It did.

Q. Was there such a heading on those letters such as is on the letter shown to you?

A. On most of them there was, but cannot say there was on all of them.

Q. State what that heading is.

A. Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain. This is all the heading.

Q. Who were the proprietors of the Corn Exchange elevator?

A. A. F. Smith & Co. advertised to be.

Q. You understood them to be proprietors at the time that letter was directed to Oswego?

A. I understood them to be the persons conducting the business.

Q. Were A. F. Smith & Co., whom you understood to be the persons conducting the business, the same A. F. Smith & Co. upon whom the drafts remitted for acceptance were drawn?

A. I had no knowledge on the subject whether they were one and the same firm or not.

Q. Had you any knowledge at the time that they were different persons?

A. I had not.

Q. Did the counsel for the defendants produce to you your original letter, of which Exhibit F purports to be a copy?

A. He did.

Q. Do you know when or from whom he obtained that letter?

A. I do not.

Q. Had you seen that letter from the day it was mailed to A. F. Smith & Co., or the proprietors of the Corn Exchange elevator, until it was produced here on this examination?

A. I had not.

Q. Who did the correspondence, generally, of the Merchants' Bank?

A. One of the clerks did the correspondence of enclosures of checks; the important correspondence I did myself. I signed all the letters, I think, at that time.

Q. Had you the general control of the business of the bank?

A. No, sir; I had not.

53 Q. What were your duties as cashier of the bank?

A. My business was to see that the business was conducted accurately, and have oversight of the clerks and correspondence.

Q. By whom were you employed as cashier of that bank, to attend to the duties you have described?

A. Employed by Norris Winslow. He was the proprietor of the bank.

(Plaintiff's counsel here read from the deposition of Norris Winslow, taken on the 12th of May, 1870, before U. S. Commissioner A. B. Getty, at Oswego, as follows:)

NORRIS WINSLOW testified as follows: I reside in Watertown, N. Y., and more than one hundred miles from the city of New York. My age is thirty-five years.

Q. Did you do business in Watertown, N. Y., in September and October, 1869, under the name of the Merchants' Bank?

A. Under the name of the Merchants' Bank, Norris Winslow, banker.

Q. Was there any other bank at Watertown known as the Merchants' Bank?

A. Not to my knowledge.

Q. Was any other person, and who, if so, interested with you as owner, or otherwise, in said Merchants' Bank?

A. No one was interested with me. I was the sole owner. The business was done exclusively as a private bank, and all drafts and certificates so stated.

Q. Did you know in September and October, 1869, the firm of A. F. Smith & Co., in Oswego, N. Y.?

A. I did.

Q. How long had you known said firm of A. F. Smith & Co., in Oswego?

A. If I recollect right, in the neighborhood of a year and a half.

Q. What was their business in Oswego, as far as you know?

A. I supposed them to be commission merchants, and buying and selling grain, perhaps, and dealers in grain.

Q. Did you know them as proprietors of the Corn Exchange elevator, in Oswego?

A. I did.

Q. What was their business as proprietors of said elevator?

A. I supposed it to be the ordinary business of receiving, shipping, and storing grain.

Q. How long had you known the warehouse or elevator situated in Oswego, called the Corn Exchange elevator?

A. I had known it for some years prior to 1868, by seeing the name printed on the building, in passing through the city.

Q. Were you at any time, and when, owner or part owner of the said warehouse?

A. I purchased a third interest, I think, in the early part of 1869.

Q. Who were owners with you of the said elevator?

A. Mr. Delos De Wolf and A. F. Smith, of the firm of A. F. Smith & Co., I understood it to be. I am not positive of that.

54 Q. Did A. F. Smith & Co. lease the warehouse or elevator; and, if so, from whom and when?

A. I leased them my interest in May, 1869, for one year.

Q. Did the Merchants' Bank, at Watertown, receive any consignments of wheat in Sept. or Oct., 1869, from the several plaintiffs in these several suits, or any or either of them, and which of them?

A. I can say we received consignments from some of these parties, but whether in September or October, or as to the time, I cannot say.

Q. Who in the Merchants' Bank gave personal attention to, or had charge of, such consignments?

A. The business was all under my charge.

Q. Did you give directions in relation to such consignments?

A. Those cargoes were, by my direction, ordered to be delivered to the Corn Exchange elevator.

Q. Have you with you letter-press copies of the letters which, by your direction, were written to A. F. Smith & Co., proprietors of the Corn Exchange elevator, or to A. F. Smith & Co., or to the Corn Exchange elevator, in relation to the cargoes of the plaintiffs, or either of them, consigned to the Merchants' Bank in the latter part of September and in the month of October, 1869?

A. I think I have some of them. I don't know whether I have them all or not.

Q. Are the copies hereto annexed, and by the commissioner marked, respectively, Exhibits J. F. M. No. 4, and J. F. M. No. 5, copies of letter-press copies produced by you?

A. They are.

The counsel for the plaintiff here read in evidence said Exhibits J. F. M. No. 4 and No. 5, the first referring to the cargo of schooner Atmosphere, and the second to the cargo of schooner Thomas Parsons, as follows:

EXHIBIT J. F. M. No. 4, A. B. G.

SEPT. 27TH, '69.

A. F. SMITH & CO.,
Proprietors Corn Exchange Elevator, Oswego, N. Y.:

D'R SIRS: I enclose herewith an order to deliver to you the cargo of schooner Atmosphere, 14,867 bush. of No. 2 Milwaukee spring wheat, consigned to us by D. Ferguson, cashier, Milwaukee, Wis., and is to be held by you for us until the following draft is paid:

Geo. I. Jones & Co. on A. F. Smith & Co., Oct 26th..... $14,472 15

Yours, resp'y,

J. F. MOFFATT, *Cash'r.*

EXHIBIT J. F. M. No. 5, A. B. G.

SEPT. 27TH, '69.

A. F. SMITH & CO.,
Proprietors Corn Exchange Elevator, Oswego, N. Y.:

D'R SIRS: I enclose an order to deliver to you 18,754 $\frac{50}{60}$ bush. No. 2 Mil. spring wheat, consigned to us by the Wis. Marine & Fire
55 Ins. Co. Bank, Milwaukee, and which is to be held by you for us until the following drafts are paid:

Oliver & Hart on A. F. Smith & Co., st..... $3,750
" " do. Oct. 15..... 19,462 78

Yours, resp'y,

J. F. MOFFATT, *Cash'r.*

Q. Was there any other person in your bank who performed the duties of cashier but Mr. Moffatt?

A. No, sir; I don't know as there was.

Q. When or about when did you first know that any of the wheat in question in these suits, or either of them, had been removed or shipped from the Corn Exchange elevator?

A. A short time after the failure of A. F. Smith & Co.

Q. Did you, or any one on behalf of the bank, give notice to the plaintiffs, or either of them, of the removal of the wheat?

A. I gave them notice personally, in Oswego, very soon after the failure.

Q. Did the Merchants' Bank, after the failure of A. F. Smith & Co., transmit to the parties in Milwaukee, from whom they received the drafts and bills of lading, the same, after the failure and suspension of A. F. Smith & Co.?

A. They were returned and protested as fast as they became due, I suppose, in all cases.

Q. Did the Merchants' Bank receive or retain any and what amount of the proceeds of the sight-drafts forwarded by the plaintiffs, or either of them, in Sept. and Oct., 1869?

A. I cannot say. In some cases we have received one-eighth of one per cent. for collection, but in a majority of the cases we have received nothing.

Cross-examination read by defendants' counsel:

Q. Were you acquainted with A. F. Smith & Co. before they came to Oswego?

A. Yes, sir, I was, and have been acquainted with them ever since. I have been acquainted with the members composing the firm some ten years.

Q. Did they keep an account with your bank before they came to Oswego from Cape Vincent, and thereafter until their failure in October, 1869?

A. They did.

Q. Do you recollect, and, if you do, will you please state the date of their failure in October, 1869?

A. I think it was the 16th of Oct. It might have been the 15th; it was one day or the other. I now think it was the 15th.

Q. Do you know, and, if so, please state what was the standing and credit of A. F. Smith & Co. prior to and down to their failure?

A. They enjoyed an enviable reputation and very high credit.

Q. Did any of the banks at Milwaukee consigning cargoes of wheat by bills of lading, with drafts drawn on A. F. Smith & Co., make any, and, if any, what arrangement, with your bank or with you for
56 the payment by you of the freight on the cargoes of the vessels bound to Oswego?

A. Not any.

Q. Did the banks at Milwaukee consigning cargoes by bill lading to you, with drafts drawn on A. F. Smith & Co., put you in funds for the payment of freight on the cargoes on arrival at Oswego, or for payment of insurance on the cargoes after the cargoes were discharged?

A. They did not.

Q. Was it the course of business of your bank or of bankers generally, receiving like consignments by bill of lading, with drafts drawn against the cargo, to make advances for freight on the cargoes?

A. It was not with us, nor with other banks, as far as I know.

Q. Had you any interest in the business carried on by A. F. Smith & Co. at the Corn Exchange elevator at Oswego?

A. None whatever.

Q. Was the firm of A. F. Smith & Co., the proprietors of the Corn Exchange elevator, the same A. F. Smith & Co. who were commission merchants and dealers in grain, doing business at the Corn Exchange elevator, and the persons upon whom drafts accompanying the bills of lading received from the Milwaukee banks were drawn?

A. They were; and they were known by me to be the same in 1868 and 1869.

Q. Did you ever see the original orders addressed to the captains respectively for the delivery of the cargoes of the vessels in question?

A. I don't recollect that I did.

Q. Will you look at the letter now shown you, of which Exhibit N. W. No. 1 is a copy, and state in whose handwriting that letter is?

A. It is in mine.

The defendants' counsel here read said letter, of which N. W. No. 1 is a copy, as follows:

EXHIBIT N. W. No. 1, A. B. G.

NORRIS WINSLOW, *President.* J. F. MOFFATT, *Cash'r.*

MERCHANTS' BANK, WATERTOWN, N. Y.,
Oct. 15*th*, 1869.

Messrs. DAVID DOWS & Co.:

GENTS: Messrs. A. F. Smith & Co., of Oswego, N. Y., have given me an order on you for any margin due them on grain, or money advanced by them to you, &c.

Please inform me, if convenient, what amount there is likely to be due them from your house.

I sent the order to our correspondent, Messrs. Denny & Co., who has, I presume, ere this called on you.

Yours, very truly,

N. WINSLOW.

Then the plaintiff's counsel read the deposition of Sidney Bickford, taken on the 3d May, 1870, before U. S. Commissioner A. B. Getty, at Oswego, as follows:

57 SIDNEY BICKFORD. I reside in Oswego, N. Y., more than one hundred miles from the city of New York, and my age is thirty-six years. I have resided in Oswego about two years. I am one of the firm of A. F. Smith & Co., Oswego, and, with A. F. Smith, compose the entire firm.

Q. Were they in the months of September and October, 1869, the proprietors of the warehouse situated in the city of Oswego known as the Corn Exchange elevator?

A. They were.

Q. Who at that time were the owners of the lot and the building?

A. Mr. De Wolf, Mr. Winslow, and Mr. Smith, I supposed to be the owners.

Q. Did the firm of A. F. Smith & Co. lease the warehouse from those parties?

A. Yes, sir.

Q. Where is that warehouse located in the city of Oswego?

A. In the 2d ward, between East First street and the Oswego River; right on the river, and north of Cayuga street.

Q. What is the size of that warehouse?

A. I don't know its size.

Q. What is its capacity for storage?

A. About 250,000 bushels.

Q. How is it arranged inside for the reception of grain?

A. It is provided with bins.

Q. How many bins are there in the warehouse?

A. I think there are fifty-one.

Q. What quantity of grain can be stored in each bin?

A. They are about the same size, except three; and have no personal knowledge what each bin will hold, having never weighed any into the bins.

Q. Is each bin numbered?

A. Each bin is numbered, except three; on the rear of the building are three not numbered, intended for the delivery of grain to teams.

Q. In what manner are the bins numbered?

A. They are numbered by figures, on the spouts leading from the bins, and presume they are numbered above also, but never noticed them.

Q. Are these bins all on the same floor?

A. The bins are on the same level.

Q. How or by what process is the grain removed from the vessel into the warehouse?

A. The vessel is hauled up alongside of the dock; the leg of the elevator is introduced into the hold of the vessel. This leg is so constructed that it swings out from the elevator and is lowered into the vessel, and the grain is taken up in sheet-iron buckets, attached to a belt running inside the elevator-leg, and is deposited in a receiving-bin at the top of the building; from that bin it is thrown into the weigh-hopper and weighed, which is lower than the receiving-bin; that weighing-hopper weighs usually 60 bushels at a time. The grain then goes either to other bins for storage, or for transhipment into canal-boats; after
58 having been stored in the bins, the grain is thrown from the bins on to a conveyor, a wide belt, and is discharged at the foot of the lofters, and is then elevated to the receiving-bin at the top of the building, from which it is thrown into the weigh-hopper and weighed, and discharged into the spout running into the canal-boat or vessel.

Q. Describe what you mean by the term "lofters."

A. It is a belt provided with buckets, which elevates the grain from the bottom to the top of the elevator.

Q. When a vessel is discharging a cargo at the warehouse, how many men are employed in the business at the elevator?

A. Three usually.

Q. What are their duties?

A. The foreman has the general supervision of the work, one runs the machinery, and one to weigh. I mean by machinery, the machinery for elevating the grain into the warehouse, as I have described.

Q. Who was the foreman in Sept. and Oct., 1869?

A. Patrick McCanna.

Q. Who was the weigher?

A. I think we had at the time Charles Bough and Robert Burgess.

Q. Who run the machinery?

A. I think we had two machinery men, George Minor and H. Maxon. George Minor was there all the time, and Maxon part of the time; Maxon was there, I should think, the whole of the month of September, and until about the 20th of October; I suppose he is in Oswego now; Minor is here now.

Q. Which of the weighers was there all the time during the months of Sept. and Oct., 1869?

A. Burgess was there, I know, during the whole time; Robert Burgess and Charles Bough, I think, left some time in October; they are both in Oswego now.

Q. Was a tally-book kept at the elevator?

A. There were tally-books used there, and not kept there, except when in use.

Q. For what purpose were those tally-books used in the elevator?

A. For recording the weight of the grain as it was received or discharged from the elevator.

Q. Did that tally-book contain the names of the vessels from which the grain was taken and carried into the elevator?

A. Yes, sir.

Q. What other book or books were used in the elevator in connection with the receiving or discharging of grain?

A. None.

Q. Who kept the tally-book?

A. The weighman recorded the tallies into the tally-book as the grain was weighed.

Q. Did he report to any person connected with the elevator, and who; and in what way did he report the amount of grain received into the elevator?

A. He reported by bringing the tally-book to the office; either he or the foreman.

59 Q. Into whose charge did he or the foreman deliver the tally-book?

A. He laid the book upon the desk in the office; don't know as he reported in any other way. It was not left at the book-keeper's desk particularly, but on a desk occupied by all of us.

Q. How many book-keepers did A. F. Smith & Co. keep in Sept. and Oct., 1869?

A. One; and his name was John H. Forsyth.

Q. Were any entries made on any book from the tally-book; and, if so, on to what book, and by whom made?

A. The entries of receipts and deliveries of grain were entered in a book, the grain-book, by Mr. Forsyth, and taken by Mr. Forsyth from the tally-book.

Q. What was your particular duties as member of the firm of A. F. Smith & Co.?

A. I conducted the commission correspondence usually, and had a general oversight of the office business.

Q. Did you keep the run of the receipt and delivery of grain?

A. I had a pretty fair knowledge of it at the time.

Q. Does the tally-book now before you contain the tallies of the cargoes of the lake vessels, or schooners, Thomas Parsons and Atmosphere, which arrived in Oswego in the months of September and October, 1869, upon the discharge of the cargoes of wheat from those vessels into and from the Corn Exchange elevator at Oswego?

A. The books contain what purports to be the tallies.

Q. Have you any doubt that they do contain the tally entries of the cargoes of those vessels?

A. I have not.

Q. Does the grain-book contain the entries of the grain received from the said schooners Thomas Parsons and Atmosphere in the months of September and October, 1869, upon the discharge of those vessels into the Corn Exchange elevator at Oswego, and also the delivery or shipment of the same grain from the elevator?

A. It contains what purports to be those entries.

Q. Will you produce copies of the entries in the tally-books and in the grain-book in relation to the receipt, delivery, or shipment of the

cargoes, or any portion of the cargoes, of the said schooners Thomas Parsons and Atmosphere, which arrived in September or October, 1869?

I produce tally of receipt of the schooner Thomas Parsons, October 2d, 1869, account A. F. Smith & Co., of in all 18,734$\frac{27}{60}$ bushels, showing that 7,400 bushels thereof was spouted into the canal-boat Enterprise, (not in controversy in this suit,) and that 11,334$\frac{27}{60}$ bushels went into bins Nos. 26, 3, and 4, which is marked Exhibit No. 30, A. B. G.

Next a tally of receipt of wheat from the schooner Atmosphere, October 3d, 1869, for account A. F. Smith & Co., of 14,850$\frac{47}{60}$ bushels, which went into bins Nos. 8, 10, 32, and 30, which is marked Exhibit No. 31, A. B. G.

A tally of deliveries October 4, 1869, by order A. F. Smith & Co., to the canal-boat Mine Dingman, of wheat ex Thomas Parsons,
60 from bins Nos. 3, 4, 26, in all of 7,900 bushels, marked Exhibit No. 38, A. B. G.

A delivery tally, marked Exhibit No. 39, A. B. G., showing according to its purport, a delivery October 5, 1869, by order of A. F. Smith & Co., to the boat E. D. Case, of wheat ex Atmosphere, in all of 7,660 bushels.

A delivery tally, Exhibit No. 41, A., showing a delivery, according to its purport, to the canal-boat Anna Rebecca, October 8, 1869, by order of A. F. Smith & Co. of wheat ex Atmosphere, Phalrape, Camanche, and Corsican, of 7,200 bushels wheat, and a delivery to the canal-boat Harm and Post, by order of A. F. Smith & Co., of wheat ex Parsons and Atmosphere, amounting to in all 7,800 bushels.

And the said plaintiff's counsel put in evidence and read said Exhibits No. 30, A. B. G., No. 31, A. B. G., No. 38, A. B. G., No. 39, A. B. G., No. 41, A., A. B. G.

Plaintiff's counsel next offered in evidence entries from the grain-book of A. F. Smith & Co., showing, according to their purport, receipts 1869, October 2, from the schooner Thomas Parsons, for account A. F. Smith & Co., 18,734$\frac{27}{60}$ bushels wheat into bins 26, 3, and 4, and deliveries against the same date, October 2d, into canal-boat Enterprise, for account A. F. Smith & Co., of 7,400 bushels; October 4th, canal-boat Mine Dingman, 7,900 bushels; and in the boat Harm and Post, 3,434$\frac{27}{60}$ bushels. And showing receipts October 3d, 1869, from schooner Atmosphere, for account A. F. Smith & Co., 14,850$\frac{47}{60}$ bushels, and deliveries against the same, October 4, boat Harm and Post, for account A. F. Smith & Co., 4,365$\frac{33}{60}$ bushels; October 5, canal-boat E. D. Case, 7,660 bushels; October 8, Anna Rebecca, 2,825$\frac{14}{50}$.

The defendants' counsel objected to the admissibility of these entries from the grain-book of A. F. Smith & Co., as matter of account of said wheat with A. F. Smith & Co., and as not evidence of the identity of the deliveries with the receipts, at all events not without calling the book-keeper who made the entries, or other evidence proving the identity. And thereafter, after discussion of the question, defendants' counsel offered to admit it as sufficiently proved that 7,900 bushels of wheat shipped by A. F. Smith & Co., in canal-boat Mine Dingman, under canal bill of lading of date October 4, 1869, was part and parcel of the wheat ex schooner Thomas Parsons, and the 3,434$\frac{27}{60}$ bushels of 7,800 bushels shipped by A. F. Smith & Co., under canal bill of lading of date October 5, 1869, in the boat Harm and Post, was part and parcel of

the wheat ex schooner Thomas Parsons. That 4,365$\frac{33}{60}$ bushels of the 7,800 bushels shipped in the boat Harm and Post was part and parcel of the wheat ex schooner Atmosphere, and that 7,660 bushels wheat shipped in the canal-boat E. D. Case, by A. F. Smith & Co., under canal bill of lading of date October 5, 1869, came from the cargo of the schooner Atmosphere, and that all of said wheat by said three canal-boats, after receipt thereof by defendants at New York by said canal-boats, under canal bills lading consigning the same to de-
61 fendants, was sold by them at the rate of $1.28 a bushel. But that against the wheat by the boat Mine Dingman, they paid freight from Oswego to New York, including towage and demurrage $1,146 67

Other expenses, screening and blowing	$19 71	
Storage in New York	157 44	
Fire-insurance	25 58	
Government tax	10 13	
Commission on sales	253 25	
And against the wheat by the boat E. D. Case, freight from Oswego to New York, including towage and demurrage		1,113 06
Other expenses, screening and blowing	17 12	
Storage in New York	152 66	
Fire-insurance	24 80	
Government tax	9 82	
Commission on sale	245 50	
And against the wheat by the boat Harm and Post, freight from Oswego to New York including towage and demurrage $1,132.66		
Proportion chargeable against 3,424$\frac{27}{60}$ bushels from schooner Thomas Parsons		498 75
Proportion chargeable against 4,365$\frac{33}{60}$ bushels from steamer Atmosphere		633 91
Other expenses in respect of wheat by boat Harm and Post:		
Screening and blowing	19 46	
Storage in New York	155 38	
Fire-insurance	25 19	
Government tax	10 00	
Commission on sales	250 00	
Proportion chargeable against the 3,434$\frac{27}{60}$		158 53
Proportion chargeable against the 4,365$\frac{33}{60}$		201 50

Plaintiff's counsel accepted the foregoing admission as to identity of the wheat from the schooners Thomas Parsons and Atmosphere respectively, and of rates of sale by defendants, and withdrew all claim in respect of wheat, 2,825$\frac{14}{60}$ bushel' wheat heretofore claimed in this suit on the boat Annie Rebecca, which was thrown out of the case; and the plaintiff's counsel admitted the correctness of the statement of the payment of freight by defendants, and the other expenses claimed as charges by the defendants, without admitting the right of defendants thereto, or of any part thereof, as against the several cargoes of wheat or said plaintiffs, by way of deduction from gross amount sales or otherwise.

The plaintiff's counsel proceeds with the reading of the deposition of Sidney Bickford:

Q. Were any persons interested in the business connected with the warehouse known as the Corn Exchange elevator, in the city of Oswego, except yourself and A. F. Smith, in the months of September and October, 1869?

A. No, sir; none but our firm.

Q. Was Norris Winslow in any way interested in that elevator, aside from his being an owner in the land and the building thereon?

62 A. He was not.

Q. Did Norris Winslow or the Merchants' Bank have any interest in, or derive any profit from, the business of the Corn Exchange elevator, or in the business which was carried on in that elevator by A. F. Smith & Co.?

A. No further than he might received a profit from our transactions with and through the Merchants' Bank.

Q. Explain what you mean by "our transactions with and through the Merchants' Bank."

A. Our transactions through the Merchants' Bank were the same as through other banks. That is the whole extent of the connection with the business of the Corn Exchange elevator.

Q. Did the firm of A. F. Smith & Co. receive grain into the Corn Exchange elevator simply for storage?

A. Yes, sir.

Q. Was the elevator used also simply for the transhipping of grain?

A. It was.

Q. Was the Corn Exchange elevator known as a public warehouse for the receipt of grain for storage or transhipment?

A. It was known as a warehouse for that purpose; yes, sir.

Q. What proportion, or about what proportion, of the whole grain which was received into that warehouse, or shipped therefrom during the years 1868 and 1869, until November, 1869, went into the elevator, either for storage or transhipment?

A. All that went through the elevator went into it for storage or transhipment.

Q. About how much grain of all kinds, in 1868 and 1869, and until November, 1869, went into that elevator for storage and transhipment?

A. In 1868, I think there were between two and three million received, and in 1869 say half a million bushels received.

Q. Were your firm out of business in the busiest part of the year 1869?

A. I think the month following our suspension was probably the busiest season of the year.

Q. Was the vast quantity of grain which you have spoken of as having been in the warehouse in 1868, either for storage or transhipment, received from divers and various persons and parties, and forwarded or shipped to New York City and other places in the State of New York or other places to divers persons and parties?

A. Yes, sir.

Q. How long have you done business with defendants in these suits?

A. Some time in 1868, with Messrs. Dows & Co.

Q. Did the firm of A. F. Smith & Co. have considerable correspondence with David Dows & Co. during the years 1868 and 1869?

A. We had some in 1868, and a good deal in 1869.

Q. Who of your firm did the part of the correspondence with Dows & Co.?

A. I think I did.

Q. Did you open or see most, if not all of the letters addressed
63 to the firm of A. E. Smith & Co. in the months of September and October, 1869?

A. I presume I saw most of them. I was absent part of the month of September. I was absent from the third to the tenth of September, and also about another week later in the month.

Q. Who usually opened the letters addressed to the firm?

A. Either Mr. Smith or myself.

Q. Who usually took the letters to the post-office, and who received the letters addressed to A. F. Smith & Co. from the post-office, or the Corn Exchange elevator?

A. I think we had a boy there who took the letters to and from the post-office.

Q. Were the letters addressed to A. F. Smith & Co., or the Corn Exchange elevator, opened either by yourself or A. F. Smith?

A. I don't know that they were always; they were generally.

Q. What other person opened the letters?

A. I don't know of any other person that did. If any person did it was Mr. Forsyth.

Q. Did the Corn Exchange elevator or A. F. Smith & Co. receive any letter or letters, or orders, in the months of September and October, 1869, from the Merchants' Bank, at Watertown, in relation to the cargoes of the Thomas Parsons and Atmosphere, or either of them?

A. I think we received letters from the bank in relation to those cargoes; orders to the captains, I presume, were generally enclosed to be delivered to the captains.

Q. Were the orders enclosed in a separate envelope, or did they come enclosed in a letter?

A. I think they came enclosed in a letter addressed to A. F. Smith & Co.

Q. Did A. F. Smith & Co. receive other letters from the Merchants' Bank than the two you have mentioned, containing orders for the captains in relation to the cargoes of either of the vessels last named?

A. I think we received letters enclosing orders for the captains in all those cases.

Q. Has the firm of A. F. Smith & Co. the order sent by the Merchants' Bank in the said letters to be delivered to the captains of the said schooners Parsons and Atmosphere?

A. Not to my knowledge; I suppose they were delivered to the captains. They would be in due course.

Q. Did the captains take the orders away from the office of A. F. Smith & Co., or did you retain possession of them?

A. I suppose the captains took them away; we did not retain possession of them, as I recollect.

Q. Were the orders delivered to the captains by the firm of A. F. Smith & Co., or some employee of the firm?

A. Yes, sir; I suppose they were.

Cross-examination read by defendant:

Q. What was the business of A. F. Smith & Co. in 1868 and 1869?

A. Dealers in grain and produce, and commission merchants.

64 Q. Were they proprietors, as such, of the Corn Exchange elevator?

A. Yes, sir.

Q. Were their transactions in 1868 and 1869, for the purchase of grain for their own account, very large for Oswego?

A. They were.

Q. You stated on your direct that you received into the Corn Exchange elevator, in 1868, two millions or three millions bushels for storage, and in 1869, some half million or so. What do you mean by saying that you received that quantity of wheat for storage?

A. I mean that that quantity of grain passed through the elevator subject to charge for storage.

Q. Is a charge made on your books on all grain that comes into or passes through the elevator, of storage, whether taken in for your own account, or for sale on commission, or for transhipment, or to hold as warehousemen?

A. Yes, sir; all grain passing through the warehouse is subject to storage, in whatever character we receive it.

Q. If it is for your own account to whom is that storage charged?

A. Charged to A. F. Smith & Co.

Q. And if for other parties, whether held on commission or otherwise, is it charged to these other parties for whom it is held?

A. It is.

Q. Is that the practice in the other elevating warehouses?

A. As far as I know, it is the invariable practice.

Q. In the entries from the grain-book, to which you have testified on your direct, I observe you testified to charges for storages. Will you state to whom those charges were charged.

A. Charged to A. F. Smith & Co. In these instances I presume they were charged directly to A. F. Smith & Co's. wheat account.

Q. What of the grain received into the elevating warehouse in 1868 and 1869, amounting from two to three millions in 1868 and half a million in 1869; what proportion of that was received there by you for your own account or for sale on commission?

A. I can't tell what proportion, but a pretty large proportion, I should think; probably two-thirds of the grain received. I have not looked the books over to see.

Q. Excluding the grain received into the warehouse purchased for your own account, and received by you at the warehouse for sale on commission, and the grain received for transhipment as a commission merchant, what proportion would be left of grain received as warehousemen for storage only?

A. I cannot answer accurately without looking at my books; but it would be small compared with the whole.

Q. Was or was not that your principal business at the elevator, the receipt during those years of grain for sale for your own account or on commission, or for transhipment by you, as commission men, for western or Canadian correspondences?

A. It was.

Q. What was the nature of your transactions with the defendants, David Dows & Co.?

65 A. It was consigning property to them for sale on commission, as to David Dows & Co., under advances made by them.

Q. Did A. F. Smith & Co. ever have any transactions with David Dows & Co., as warehousemen?

A. We had not.

Q. Were the several cargoes of wheat received from the vessels named, the Thomas Parsons, Atmosphere, received as per tallies of receipts to which you have testified, purchased by A. F. Smith & Co., at Milwaukee?

A. They were.

Q. How were those purchases made?

A. Made through commission houses in Milwaukee.

Q. Were they made through such commission merchants, by order from Oswego, either by telegram or letter, or both, and by receipt of invoices, and acceptance or payment of sight-drafts, and acceptance of time-drafts?

A. The purchases were so made.

Q. Will you give the correspondence by letter or telegram, relating to the purchase of the wheat per schooner "Thomas Parsons," in its order?

A. I will. First, I produce a copy, a letter in our letter-press copy-book, sent by A. F. Smith & Co. to Oliver & Hart, Milwaukee, dated Sept. 15th, 1869, marked Exhibit T. P., No. 1, (A. B. G.) The next is a telegram from A. F. Smith & Co. to Oliver & Hart, dated September 16th, 1869, and marked Exhibit T. P., No. 2, (A. B. G.) The next is a telegram from Oliver & Hart to A. F. Smith & Co., dated September 18th, 1869, and marked Exhibit T. P., No. 3, (A. B. G.) The next is a telegram from Oliver & Hart to A. F. Smith & Co., dated September 18th, 1869, and marked Exhibit T. P., No. 4, (A. B. G.) The next is a telegram from Oliver & Hart to A. F. Smith & Co., dated Sept. 20th, 1869, and marked Exhibit T. P., No. 5, (A. B. G.) The next is a telegram from A. F. Smith & Co. to Oliver & Hart, dated September 20th, 1869, and marked Exhibit T. P., No. 6, (A. B. G.) The next is a letter from Oliver & Hart to A. F. Smith & Co., dated September 20th, 1869, and marked Exhibit T. P., No. 7, (A. B. G.) The next is a telegram from Oliver & Hart to A. F. Smith & Co., dated September 21st, 1869, and marked Exhibit T. P., No. 8, (A. B. G.) The next is a letter from Oliver & Hart to A. F. Smith & Co., dated Sept. 21st, 1869, and marked Exhibit T. P., No. 9, (A. B. G.) The next is a letter from Oliver & Hart to A. F. Smith & Co., dated September 22d, 1869, and marked Exhibit T. P., No. 10, (A. B. G.) The next is a letter from A. F. Smith & Co. to Oliver & Hart, dated September 25th, 1869, and marked Exhibit T. P., No. 11, (A. B. G.) This is all the correspondence relating to the cargo of the Thomas Parsons, except the invoices.

The counsel for defendants here read in evidence Exhibit T. P., No. 1, (A. B. G.) A copy letter from A. F. Smith & Co. to Oliver & Hart, dated Oswego, Sept. 15, 1869, of which a copy is mentioned and set forth above in deposition of Joseph B. Oliver, as Exhibit No. 4, (O. & H.) And next Exhibit T. P., No. 2, (A. B. G.,) of telegram of A. F. S. & Co. to O. & H., dated Sept. 16, 1869, of which a copy is set forth
66 in said deposition of Oliver as Exhibit No 1, (O. & H.,) excep^{t}, as given by Bickford, it is 30 days. And next Exhibit T. P., No. 3, (A, B. G.,) a telegram O. &. H. to A. F. S. & Co., dated Sept. 18, 1869, of which a copy is set forth in said deposition of Oliver as Exhibit No. 5, (O. &. H.) And next Exhibit T. P., No. 4, (A. B. G.,) as follows: Telegram dated Milwaukee, Sept. 18, 1869, addressed to A. F. Smith & Co., "Not enough to-day to attempt to fill; strong, 5½. Orders here for No. 1; No. 2, 18½, Oliver & Hart." And next Exhibit T. P., No. 5, (A. B. G.) Telegram O. & H. to A. F. S. & Co., dated Sep. 20, '69, of which a copy is set forth in said deposition of Oliver as Ex. No. 6, (O. & H.;) and next Ex. T. P., No. 6, (A. B. G.,) telegram A. F. S. & Co. to O. & H., dated Sept. 20, '69, of which a copy is set forth in said deposition of Oliver as Ex. No. 2, (O. & H.;) and next Ex. T. P., No. 7, (A. B. G.,) letter O. H. to A. F. S. Co., dated Sept. 20, '69, of which a copy is set forth in said deposition of Oliver as Ex. No. 9, (O. & H.;) and next Ex. T. P., No. 8, (A. B. G.,) telegram O. & H. to A. F. S. & Co., dated Sept.

21, '69, of which a copy is set forth in said deposition of Oliver as Ex. No. 7, (O. & H.;) and next Ex. T. P., No. 9, (A. B. G.,) letter O. & H. to A. F. S. & Co., dated Sep. 21, '69, a copy of which is set forth in said deposition of Oliver as Ex. No. 10, (O. & H.;) and next Ex. T. P., No. 10, (A. B. G.,) letter O. & H. to A. F. S. & Co., dated Sept. 22, '69, a copy of which is set forth in said deposition of Oliver as Ex. No. 11, (O. & H.;) and next Ex. T. P., No. 11, (A. B. G.,) letter A. F. S. & Co. to O. & H., dated Sep. 25, '69, a copy of which is set forth in said deposition of Oliver as Ex. No. 3, (O. & H.)

Q. Look at the paper now shown you, a copy of which hereto annexed, and marked Exhibit T. P., No. 12, A. B. G., and state what that is.

A. The invoice of a cargo of wheat by the Thomas Parsons, received from Oliver & Hart about the 25th of September, 1869, and I think it was enclosed in their letter of the 22d of September, 1869, of which Exhibit T. P., No. 10, is a copy.

The defendants' counsel here read in evidence said invoice T. P., No. 12, (A. B. G.,) of which a copy is set forth above, in deposition of said Oliver, as Exhibit No. 8, (O. & H.)

Q. Through whom were the sight and time drafts presented to your firm for payment of sight-draft and acceptance of time-draft?

A. Through the Merchants' Bank of Watertown; the sight-draft was paid and the time-draft accepted.

Q. Was such payment of the sight and acceptance of the time-draft made before the arrival of the vessel?

A. Yes, sir.

Q. Is annexed Exhibit T. P., No. 13, (A. B. G.,) a copy of the sight-draft and its endorsement?

A. It is.

The defendants' counsel here read in evidence said Exhibit No. 13.

67 EXHIBIT T. P., No. 13, A. B. G.

(Copy.)

$3,750.] MILWAUKEE, *Sept.* 22, '69.

Pay to the order of D. Ferguson, cashier, thirty-seven hundred and fifty dollars, and charge to account of—

(Signed) OLIVER & HART.

To Messrs. A. F. SMITH & Co.,
Oswego, N. Y., at Merchants' Bank, Watertown, N. Y.

(Endorsed:)
Pay to Merchants' Bank, Watertown, or order.
(Signed) D. FERGUSON, *Cas.*

[Two-cent internal revenue stamp. Cancelled.]

Q. Through whom did you purchase the wheat by the Atmosphere?

A. Through George I. Jones & Co., Milwaukee.

Q. Will you give the correspondence, by letter and telegram, relating to the purchase of the wheat per schooner Atmosphere?

A. I will. First, I produce a letter-press copy of a letter from A. F. Smith & Co. to George I. Jones & Co., dated September 15th, 1869, and

marked Exhibit G. S. and A. No. 1, (A. B. G.) The next is a telegram from A. F. Smith & Co. to George I. Jones & Co., Milwaukee, dated September 16th, 1869, marked Exhibit G. S. and A., No. 2, (A. B. G.) The next is a telegram from George I. Jones & Co. to A. F. Smith & Co., dated September 16th, 1869, and marked G. S. and A., No. 3, (A. B. G.) The next is a telegram from A. F. Smith & Co. to George I. Jones & Co., dated September 16th, 1869, Exhibit G. S. & A., No. 4, (A. B. G.) The next is a letter from George I. Jones & Co. to A. F. Smith & Co., dated September 16th, 1869, and marked Exhibit G. S. and A., No. 5, (A. B. G.) The next is a telegram from A. F. Smith & Co. to George I. Jones & Co., dated September 21st, 1869, and marked Exhibit G. S. and A., No. 12, (A. B. G.) The next is a letter from George I. Jones & Co. to A. F. Smith & Co., dated September 22d, 1869, and marked Exhibit G. S. & A., No. 14, (A. B. G.) The next is a letter from George I. Jones & Co. to A. F. Smith & Co., dated 23d September, 1869, and marked Exhibit G. S. & A., No. 15, (A. B. G.) The next is a letter from A. F. Smith & Co. to George I. Jones & Co., dated September 25th, 1869, and marked Exhibit G. S. and A., No. 16, (A. B. G.) The next is a letter from A. F. Smith & Co. to George I. Jones & Co., dated September 25th, 1869, and marked Exhibit G. S. and A., No. 17, (A. B. G.) This completes all the correspondence relating to the cargo of the Atmosphere, except the invoice of the Atmosphere.

The defendants' counsel here read in evidence Ex. G. S. & A., No. 1, (A. B. G.,) copy letter A. F. S. & Co. to G. I. Jones & Co., dated Oswego, N. Y., Sept 15, 1869, of which a copy is set forth above in the deposition of George I. Jones as Ex. No. 10, (G. I. J.) And next, telegram
68 from A. F. Smith & Co. to G. I. Jones & Co., Milwaukee, Sept. 16, 1869, Ex. G. S. & A., No. 2, (A. B. G.,) of which a copy is set forth in the deposition of George I. Jones above as Ex. No. 7, (G. I. J.). And next, telegram from George I. Jones & Co. to A. F. Smith & Co., dated Sept. 16, 1869, marked G. S. & A., No. 3, (A. B. G.,) as follows:

EXHIBIT G. S. & A., No. 3, A. B. G.

Dated Milwaukee, Sept. 16, 1869. Received at Oswego, 12 m.

To A. F. SMITH & CO.:

Our bank declines taking any paper longer than thirty (30) days, so early in the season.

Answer.

(Signed) GEO. I. JONES & CO.

And next, telegram from A. F. Smith & Co. to Geo. I. Jones & Co., dated Sept. 16, 1869, Ex. G. S. & A., No. 4, (A. B. G.,) of which a copy is set forth in deposition of George I. Jones above, as Ex. 8, (G. I. J.;) and next, letter from Geo. I. Jones & Co. to A. F. Smith & Co., dated Sept. 16, 1869, and marked G. S. & A., No. 5, (A. B. G.,) as follows:

EXHIBIT G. S. & A., No. 5, A. B. G.

GEO. I. JONES. [Office of Geo. I. Jones & Co., commission merchants.] CHA'S P. JONES.

MILWAUKEE, 16*th September*, 1869.

Mess. A. F. SMITH & CO., *Oswego.*

DEAR SIRS: We received this morning, your telegram, reading as follows: "Buy us cargo No. one and No. two, choice Milwaukee wheat.

Draw, as before, Merchants' Bank. Answer." We promptly replied by the wires, saying: "Our bank declines taking any paper longer than thirty days so early in the season. Answer." And at 2 p. m. received your reply, reading: "You may ship cargo No. one. Load schooner Gerritt Smith, if not already chartered." This latter order shall have our prompt and careful attention. We have already secured the Gerritt Smith at 12 cents freight, to load to-morrow or next day, and will commence buying the wheat this afternoon. It is now past 'change time, and there won't be any market until 3 to 3½ o'clock, when dealers began to congregate on the sidewalk. Our bankers are unwilling to take any 45 day paper just now, preferring shorter dates, so that they can turn their money several times before the close of navigation. We are now getting pretty free receipts of wheat; yesterday 62,000 bushels, and to-day 53,000. We are expecting 100,000 per day before another week, if the weather should continue as favorable as it is to-day. Yesterday, and the day before, it was wet, and threshing was delayed; but we hear that farmers turned their attention to teaming to market. The new crop has been unusually slow in moving, and the business, so far as New York is concerned, this fall, must necessarily be compressed into six weeks, and, as far as Oswego is concerned, into about
69 eight; and will have to be sharp and lively to amount to much.

We feel very confident that we have secured a good crop, and of excellent quality, and that millers and dealers wanting good spring wheat will have to rely on our market. This latter is what our visitors who have passed through Chicago tell us. We have sent you, by express, average samples of our No. 1 and 2 wheat. They weigh 60½ and 57½ lbs. per bushel. Cargoes will be as good, and some will be better colored, as the season advances. Our millers report very favorably on the lots they have ground. We should be glad to have your views of the trade this fall, and we will endeavor to reciprocate by giving information of our market.

Yours, respectfully,
(Signed) GEO. I. JONES & CO.

And next telegram from A. F. S. & Co. to Geo. I. Jones & Co., dated Sept. 21, 1869, marked Ex. G. S. & A., No. 12, (A. B. G.,) of which a copy is set forth above in deposition of George I. Jones as Ex. No. 9. (G. I. J.;) and next is a letter from Geo. I. Jones & Co. to A. F. Smith & Co., dated Sep. 22, '69, marked G. S. & A., No. 14, (A. B. G.,) as follows:

GEO. I. JONES. CHAS. P. JONES.

[Office of Geo. I. Jones & Co., commission merchants, Chamber of Commerce building.]

EXHIBIT G. S. & A., No. 14, A. B. G.

MILWAUKEE, 22 *Sept.*, 1869.

Messrs. A. F. SMITH & Co., *Oswego:*

DEARS SIRS: We received, yesterday afternoon, your telegram, "you may buy and ship us cargo prime two wheat. Draw, as before, Merchants' Bank." There were large orders here in the afternoon, from Chicago, based upon a reported advance in Liverpool, and prices advanced about 2 c. per bushel over closing figures on 'change. No. 2 sold freely at 117 @ 118, seller September, to the extent of nearly 100,000 bushels. It was very difficult to find any sellers of regular, and we only could pick up 3,000

bushels, which we bought @ 117. This morning the market opened @ 117½ but soon fell to 116½ @ 117, when we filled remainder of your order, and telegraphed "have bought 3,000 No. 2 wheat @ 116½; 8,000 @ 116¾; 4,000 @ 117. Have chartered schooner Atmosphere @ 12 c. freight. Expect to ship to-day." All of which, we trust, is satisfactory. At noon the market was lower, closing @ 121 for No. 1, and 115 for No. 2, regular. The break in the Erie Canal having a depressing effect, notwithstanding firmer prices in New York. We expect to load this afternoon; and, as the wind is favorable, the cargo will probably get through in quick time.

Yours, respectfully,

(Signed) GEO. I. JONES & CO.

And next a letter from from Geo. I. Jones & Co. to A. F. Smith & &o., dated Sept. 23, 1869, marked Ex. G. S. & A., No. 15, (A. B. G.,) of which a copy is set forth above in deposition of Geo. I. Jones as Ex. 17, (G. I. J.;) and next letter from A. F. Smith & Co. to Geo. I. Jones
70 & Co., dated Sept. 25, 1869, marked Ex. G. S. & A., No. 16, (A. B. G.,) of which a copy is above set forth in deposition of Geo. I. Jones as Ex. No. 13, (G. I. J.;) and next a letter from A. F. Smith & Co. to Geo. I. Jones & Co., dated Sept. 25, 1869, marked Ex. G. S. & A., No. 17, (A. B. G.,) of which a copy is above set forth in deposition of Geo. I. Jones as Ex. No. 12, (G. I. J.)

Q. Look at the paper now produced and shown to you, of which Exhibit G. S. & A., No. 20, is a copy, and which is hereto annexed, and state what it is.

A. The invoice of the cargo of wheat by the schooner Atmosphere, from George I. Jones & Co., Milwaukee, received in their letter of date Sept. 23, 1869, and marked Exhibit G. S. & A., No. 15, (A. B. G.)

Q. What is the date of the receipt of that letter?

A. I should think about the 25th Sept., 1869.

The defendants' counsel here read the invoice of cargo of schooner Atmosphere, Ex. G. S. & A., No. 20, (A. B. G.,) of which a copy is above set forth in deposition of Geo. I. Jones as Ex. 16, (G. I. J.)

Q. Were the sight and time drafts, mentioned in the invoice, presented first to you for payment, and second for acceptance, and through what banks?

A. The sight-draft was presented by the 2nd National Bank of Oswego, and was paid by A. F. Smith & Co.; the time-draft was presented by the Merchants' Bank of Watertown, and accepted by us. The sight-draft was paid, and the time-draft was accepted before the arrival of the vessel in Oswego. I have the sight-draft in my possession and here produce it, marked "Exhibit G. S. & A., No. 21," (A. B. G.)

Defendants' counsel read the said Exhibit G. S. and A. No. 21, (A. B. G.,) as follows:

EXHIBIT G. S. & A. No. 21, A. B. G.

(Copy.)

[Office of Geo. I. Jones, & Co., commission merchants.]

$3,759.] MILWAUKEE, 23*d Sept.*, 1869.

In current funds, pay to the order of D. Ferguson, esq., cashier, thirty-seven hundred and fifty dollars, for value received.

(Signed) GEO. I. JONES & CO.

To Messrs. A. F. SMITH & Co.,
Oswego, N. Y.

(Endorsed.)

Pay to M. B. Clark, esq., cash., or order.

D. FERGUSON, *Cash.*

[2-cent internal revenue stamp, cancelled.]

Q. Were A. F. Smith & Co. called upon for, or did they give any warehouse receipts for any of these cargoes?

A. No, sir.

Q. At the time of the payment of the sight-draft, and the acceptance of the time-drafts of each or either of these cargoes, did A. F.
71 Smith & Co. make any express or special arrangement respecting the holding or disposition of the cargo against which the drafts were drawn, in any case?

A. No, sir.

Q. Had A. F. Smith & Co. received cargoes by vessels against which drafts were drawn on them which came forward through the Merchants' Bank of Watertown, before the receipt of the cargoes in question in these cases?

A. Yes, sir; frequently during the years 1868 and 1869.

Q. What is the date of the failure of A. F. Smith & Co.?

A. I think it was the 15th or 16th of October last; it was not earlier than the 15th.

Q. Before the date of your failure, did the Merchants' Bank at Watertown, or any of their officers, look after or make any inquiries respecting the disposition of any wheat received from any of these vessels, at the time of its receipt at the Corn Exchange elevator, or at any time afterward?

A. No, sir; not to my knowledge.

Q. What was the amount of payments made by you on the cargo of the Thomas Parsons, including freight paid?

A. $6,000.

Q. What on the Atmosphere?

A. $5,534.04.

The plaintiffs' counsel read from the deposition of Bickford, re-examined, as follows:

I don't know that the cargoes of any lake vessels were ever named in our correspondence with the defendants. We have had a general correspondence with the defendants. I produce here letters of A. F. Smith & Co., relating to cargoes of several canal-boats to David Dows & Co., and their replies thereto.

The plaintiff here offered, and read in evidence, letter Ex. D. D. & Co., No. 11, from A. F. Smith & Co., to Messrs. D. Dows & Co., as follows:

EXHIBIT D. D. & Co., No. 11, A. B. G.

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.]

OSWEGO, N. Y., *Oct.* 4, 1869.

Mess. DAVID DOWS & Co.,
New York:

GENTLEMEN: We have yours 1st inst., and fully note contents. Are very glad that you will continue to give us what sight we may require on shipments, as we like to be as far as possible independent of the

banks here. We are shipping to-day, per b't M. Dingman, load choice No. 2 Milw. wheat, and being unable to reach you by telegraph, (wires all out of order,) we draw 1.20 c. per bush., less $3,500 further margins required, which we hope may meet your approval. We have nothing from your m'k't to day, but the West seems little better. Don't you think level price about reached?

Yours, truly,

A. F. SMITH & CO.

72 Exhibit D. D. & Co., No. 13. A. F. Smith & Co. to David Dows & Co., October 5, 1869.

EXHIBIT D. D. & Co., No. 13, A. B. G.

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.

OSWEGO, N. Y., *Oct.* 5, 1869.

Mess. DAVID DOWS & Co.,
New York:

GENTLEMEN: We have none of your favors to-day. We are shipping to-day, b'ts Harm and Post & E. D. Chase, 15,460 bush. prime No. 2 Mil. wheat; against the first we draw 1.15 c., but on receipt of western reports thought you might consider that too much, and so reduced it to 1.10 c. on last, which hope may be satisfactory. Please honor and oblige. We trust to get telegrams to you this a. m., and thus obtain your advice, but could not, so were obliged to use our own judgment in drawing. Our m'k't very dull; wheat about 1.25 c., and 30 for two grades of spring. Barley nominal, 1.30 for Canada.

Yours, truly,

A. F. SMITH & CO.

And the letter David Dows & Co. to A. F. Smith & Co., as follows:

EXHIBIT D. D. & Co., No. 27, A. B. G.

N. Y., *Nov.* 5, '69.

Mess. A. F. SMITH & Co.,
Oswego:

GENTS: Your favor of 4th, rec'd and noted. We have been expecting your Mr. Smith here, and have not written for that reason; we have thought best to sell your wheat as it came in; several loads were out of order, and we sent them to store to give it airing, &c. Below we give you sales:

Boat M. Dingman, 7,900 No. 2, " 1.28 in store.
" Harm & Post, 7,800 No. 2, " 1.28 "
" E. D. Chase, 7,600 No. 2, " 1.28 "

all of which, we trust, will be satisfactory to you; this leaves on hand, unsold, b't Hagaman, 7,100 No. 1 in store; b't Geo. Ames, 7,800 No. 1, afloat, and load No. 2, in store, bot. some time ago.

Market to-day was dull and heavy. No. 1, spring, 1.33 @ 1.37; No. 2, 1.25 @ 1.29; Red winter, 1.38 @ 1.41.

Yours, &c.,

DAVID DOWS & CO.
P. H. MARTIN.

The plaintiff here put in evidence the charter or certificate of incorporation of the plaintiff, dated 11th of November, 1852, of which the following is a copy:

73 *Certificate of incorporation of the Wisconsin Marine and Fire Insurance Company.*

We, George Smith and Alexander Mitchell, hereby certify that we have formed an association for the purpose of doing banking business under the provisions of an act of the legislature of the State of Wisconsin, entitled "An act to authorize the business of banking," approved on the nineteenth day of April, A. D. 1852, and have assumed, and do hereby assume, the following name, viz, "The Wisconsin Marine and Fire Insurance Company," as that by which the said association shall be known and distinguished in all its dealings. That the city of Milwaukee, in the county of Milwaukee, in the State of Wisconsin, is, and shall be, the place where the business of said association is to be carried on. That the capital stock of said association shall be, and is, the sum of one hundred thousand dollars, and shall be, and is, divided into one thousand shares of one hundred dollars each, of which capital stock the said George Smith, residing in the city of Chicago, in the State of Illinois, owns and holds seventy-five thousand dollars, or seven hundred and fifty shares; and the said Alexander Mitchell, residing in said city of Milwaukee, owns and holds twenty-five thousand dollars, or two hundred and fifty shares. That the said association shall commence on the first Monday of January, A. D. 1853, and shall terminate on the first Monday of January, A. D. 1873. And we further certify that said association has by its articles of association provided that its capital stock may be increased from time to time to a sum not exceeding five hundred thousand dollars, in shares of one hundred each.

In witness whereof we have hereunto set our hands and seals, this eleventh day of November, A. D. eighteen hundred and fifty-two.

GEORGE SMITH, [SEAL.]
ALEXANDER MITCHELL. [SEAL.]

STATE OF WISCONSIN,
Milwaukee County, ss:

On this eleventh day of November, A. D. 1852, before me, a notary public, residing in the county of Milwaukee, personally came Alexander Mitchell and George Smith, to me known to be the same persons who signed the above certificate, and acknowledged the same to be their free and voluntary act.

[SEAL.] D. FERGUSON,
Notary Public.

Recorded November 12th, 1852, at 10½ o'clock a. m.

And proved that said certificate of incorporation and acknowledgment was duly recorded November 12th, A. D. 1852, at 10½ o'clock, a. m., in the office of the register of deeds in and for the county of Mil-
74 waukee, in the State of Wisconsin, in volume 1 of bank records, page 1, and that a certified copy thereof was duly filed on the 12th day of January, 1853, in the office of the State treasurer of the State of Wisconsin, and of the bank controller.

The plaintiff's counsel here put in evidence deposition of D. Ferguson,

taken ex parte before Francis Bloodgood, U. S. commissioner, at Milwaukee, October 1, 1870, as follows:

DAVID FERGUSON, being duly sworn in both of the above-entitled causes, doth depose and say as follows, to wit:

My name is David Ferguson. I reside in the city of Milwaukee, and State of Wisconsin, more than 100 miles from the city of New York. I am cashier, and was cashier in September and October, 1869, of the Wisconsin Marine and Fire Insurance Company, plaintiff in the two causes above entitled.

Q. Were you in Oswego, N. Y., at any time in October or September 1869?

A. I was not.

Q. Did you ever see A. F. Smith, of the firm of A. F. Smith & Co., of Oswego, N. Y.?

A. I never saw him, to my knowledge.

Q. How long have you resided in the city of Milwaukee, Wisconsin?

A. Nearly thirty (30) years.

Q. Did you ever reside in Oswego, N. Y.?

A. I never did.

Q. Are you the D. Ferguson, cashier, described in a certain bill of lading bearing date Milwaukee, Sep. 22d, 1869, marked on the back Exhibit No. 1, F. B.?

A. I am.

Q. Is the said bill of lading the one delivered to the plaintiffs by Oliver & Hart, of the cargo of the schooner Thos. Parsons?

A. It is.

Q. What knowledge, if any, had you at the time the plaintiff received said bill of lading as to any memorandum being made, on the captain's bill of lading, by Oliver & Hart?

A. I had no knowledge.

Q. Did you ever see what is called the captain's bill of lading, of the cargo of the schooner Thomas Parsons, of the date of Sept. 22d, 1869?

A. I never saw it.

Q. Upon what bill of lading did the plaintiffs make its advances to Oliver & Hart?

A. The bill of lading now shown me, bearing date Milwaukee, September 22d, 1869, signed W. C. Harry, and marked on the back Exhibit No. 1, F. B.

Q. State whether or not you, as cashier of the plaintiff, or in any other capacity, ever gave any, and if any, what, order to A. F. Smith, of the firm of A. F. Smith & Co., of Oswego, N. Y., to receive the said cargo of the said schooner, Thomas Parsons.

A. I never gave him any order for that purpose.

Q. When, and from whom, did you first hear that the said A. F. Smith had claimed or represented that he had an order from you, to receive the said cargo of the said schooner Thos. Parsons.

75 A. This morning, from H. M. Finch, esq., counsel for the plaintiff.

Q. To whom did you give directions as to the disposition of the said cargo?

A. To the Merchants' Bank of Watertown, N. Y.

Q. Did you at any time, and when, know or learn that the captain of the schooner Thomas Parsons claimed to have delivered the said cargo of the said schooner Thomas Parsons to A. F. Smith & Co., upon an order from you to A. F. Smith?

A. I did not, until this morning, when I then learned it from H. M. Finch.

Q. State whether anything was said to you by any person, and, if so, when, as to any direction or order given to the captain of the schooner Thomas Parsons, for the delivery of the said cargo, at or before the receipt by the plaintiff of the bill of lading marked on the back Exhibit No. 1, F. B.

A. Nothing was said to me by any one. I did not know at that time of any other order or direction than that shown by the bill of lading marked on the back Exhibit No. 1, F. B.

D. FERGUSON.

Read over to the witness, and subscribed to by him, before me, this 1st of October, A. D. 1870.

FRANCIS BLOODGOOD,
U. S. Commissioner.

The plaintiff put in evidence a demand on the defendants, November 6th, 1869, by the attorney of the plaintiff, of which the following is a copy:

NEW YORK, *Nov. 6th*, 1869.

Messrs. DAVID DOWS & CO.,
New York City:

GENTLEMEN: Please take notice that the wheat received by you, on or about the thirtieth day of October, A. D. 1869, from the canal-boat M. Dingman, and also the wheat received by you on or about the first day of November, A. D. 1869, from the canal-boats Harm and Post and E. D. Case, and two thousand eight hundred and twenty-five bushels received by you on or about the fourth day of November, A. D. 1869, is the property of the Wisconsin Marine and Fire Insurance Company, of Milwaukee, Wisconsin, and that it hereby demands from you the possession and delivery of the said cargoes of wheat, and each of them, or on failure to deliver the same the said Wisconsin Marine and Fire Insurance Company will hold you responsible for the value of the same, with interest.

Very respectfully, yours, &c.,
The Wisconsin Marine and Fire Insurance Company,
By H. M. FINCH,
Its Agent and Attorney.

And the answer of the defendants to this demand, dated New York, Nov. 6th, 1869, as follows:

76 If you are entitled to the wheat, and you will pay the freight and charges and our advances, and take care of the order to Winslow, we will account to you for the proceeds; but we don't know you in the matter.

Very respectfully,

DAVID DOWS & CO.

Plaintiff rested.

The counsel for defendants, after opening the case to the court and jury, offered in evidence a stipulation of the plaintiff's attorney, in proof of the execution of the canal bills of lading under which the defendants

claim the wheat in controversy from the canal-boats Mine Dingman, Harm & Post, and E. D. Case, as follows:

It is hereby stipulated to admit on the trial of this cause, that George A. Bennett was a forwarding and shipping merchant, residing in Oswego, in September and October, 1869, and agent of the canal-boats Mine Dingman, Harm & Post, E. D. Case.

And that said Bennett signed the bill of lading of the Mine Dingman, (Marked Ex. No. 1, C. V. S.,) dated Oswego, Oct. 4th, 1869, and delivered it to A. F. Smith & Co., from whom the property was received.

And that he also signed the bill of lading of the boat Harm & Post, (marked Ex. No. 2, C. V. S.,) dated Oct. 5, 1869, and delivered it to A. F. Smith & Co.

And that he also signed the bill of lading of the boat E. D. Case, (marked Ex. No. 3, C. V. S.,) dated Oswego, Oct. 5, 1869, and delivered it to A. F. Smith & Co.

And that the grain mentioned in these several bills of lading was on board of the boats at the time of the execution and delivery of said several bills of lading.

New York, Nov. 18, 1872.

PORTER, LOWREY & SOREN,
Attorneys for Plaintiff,
By H. M. FINCH.

JOHN AMERMAN, called as a witness for defendants, being sworn, testified as follows:

I was cashier of David Dows & Co. in September and October, 1869. I know of the receipt from A. F. Smith & Co., by David Dows & Co., in New York, of the letter now in my hand, of A. F. Smith & Co. to them, dated Oswego, October 4, 1869, advising of the shipping of that date, per boat M. Dingman, load Milwaukee wheat. It was received by David Dows & Co. October 7, 1869, a. m.

Q. What was the next document received?

A. The next document received was the sight-draft of A. F. Smith & Co., drawn against this boat-load, dated October 4, 1869, for $5,980, with B. L. boat M. Dingman and certificate of insurance on the same attached—B. L. marked No. 1 C. V. S., signed by G. A. Bennett. These documents came through the 9th National Bank of New York. The draft was presented by that bank October 7th, 1869, and paid by
77 David Dows & Co. on presentation thereof with the B. L. and certificate of insurance, and the B. L. and certificate of insurance were retained by David Dows & Co. The letter was received in the morning of October 7, and the B. L. with draft attached and certificate of insurance were received on same day, October 7. The draft was paid, and B. L. and certificate of insurance attached retained. The following is a copy of the letter of A. F. Smith & Co., dated October 4, 1869, received by D. Dows & Co., October 7, '69, so far as relates to shipment of the M. Dingman, and of the draft with B. L. and certificate of insurance attached to draft when it was presented for payment:

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator. Commission merchants for the sale of all kinds of State, western, and Canada grain.

OSWEGO, N. Y., *Oct.* 4, 1869.

Mess. DAVID DOWS & Co.,
New York:

GENTLEMEN: We are shipping to-day, per boat M. Dingman, load choice 2 Mil. wheat, and being unable to reach you by telegraph, (lines

all out of order,) we draw 120 c. per bush. less $3,500 further margins required, which we hope may meet your approval. We have nothing from your m'k't to-day, but the West seems little better. Don't you think "hard pan" about reached? Will be shipping more to-morrow. Please advise how much we shall draw by wires on receipt.

Yours, truly,

A. F. SMITH & CO.

The draft.

[A. F. Smith & Co., commission merchants.]

($5,980.) OSWEGO, N. Y., *Oct. 4th*, 1869.

[U. S. revenue stamp, 2 cents, cancelled.]

At sight pay to the order of J. T. Hill, cas., fifty-nine hundred and eighty dollars.

A. F. SMITH & CO.

To DAVID DOWS & Co., *New York.*

(Endorsed:) Ninth National Bank, New York, paid.

(Stamped on face:) Paid Oct. 7, 1869.

Bill of lading.

No. OSWEGO, *Oct. 4th*, 1869.

Shipped by A. F. Smith & Co. in apparent good order, on board canal-boat Mine Dingman, of Phœnix, Captain Hancock, the following described property, to be transported to the place of destination without unnecessary delay, and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges, as prescribed in this bill. Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather, after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time
78 the cargo, or consignees, are to pay demurrage at the rate of two per cent. per day, upon the freight (including tolls) for each and every day of such demurrage, over the three days, as above specified, until the cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo, to be paid by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for any deficiency (caused by heating) exceeding five bushels for each one thousand bushels.

The freight charges and demurrage payable to Sprague & Favill, or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

David Dows & Co., 7,900 bus. wheat.
New York.
Ac. A. F. Smith & Co.,
Freight to N. Y., 14 c. per bush.
(Signed) G. A. BENNETT.

(Endorsed:) A. F. Smith & Co.
REC. 436—5

Certificate of insurance.

INLAND MARINE DEPARTMENT,
ALBANY CITY INSURANCE COMPANY,
No. 5,685.] *Oswego, Oct. 4th*, 1869.

This certifies that A. F. Smith & Co. insured under and subject to the conditions of canal policy No. 173, issued by the Albany City Insurance Company, at the Oswego agency, in the sum of ten thousand two hundred dollars, on 7,900 bushels of wheat, at $ per bushel, inboard cargo of Mine Dingman, to wit, $ at and from to at per cent., $10,200 at and from Oswego to N. Y., at per cent., to $, which premium is hereby acknowledged to have been received. Loss (if any) payable to A. F. Smith & Co., or order hereon, and return of this certificate.

JAMES HENDRICKS,
Vice-President.

Countersigned at Oswego this 4th day of October, 1869.
A. F. SMITH & CO., *Agents.*
FORSYTH.

(Endorsed:) A. F. SMITH & CO.

Q. Will you look at the letter produced and shown you dated Oct. 5, 1869, and state what it is?

A. It is a letter of A. F. Smith & Co., dated Oswego, October 5, 1869, advising of the shipping by the boat Harm and Post and E D. Case, received by David Dows & Co. in N. Y. on 7th October, 1869 a. m.

Q. What was next receipt?

A. The next receipt was a draft of A. F. Smith & Co., dated Oswego, October 5, 1869, for $8,426, with a B. L. of the boat E. D. Case, now marked Exhibit No. 3, C. V. S., and certificate of insurance dated October 5, 1869, attached. A sight-draft A. F. Smith & Co., dated October 5, 1869, for $8,970, with the bill lading and certificate of insurance attached to the latter draft B. L. Harm and Post, dated
79 October 5, 1869. The B. L. now marked Exhibit No. 2, C. V. S.

The B. L., with the draft attached of the boat E. D. Case, came through the Ninth National Bank, N. Y., and David Dows & Co. paid the draft on presentation, and retained the B. L. and certificate of insurance. The B. L. of the Harm and Post came through the Metropolitan National Bank.

We paid the draft on presentation Oct. 7, and retained B. L. and certificate of insurance.

I have all these papers, to which I have testified, in my hands now.

The following is a copy of a letter of A. F. Smith & Co., dated Oct. 5, '69, rec'd by D. D. & Co., Oct. 7, '69, a. m., so far as relates to these shipments by boats E. D. Case and Harm and Post, and of each draft with B. L. and certificates of insurance attached to drafts when presented for payment.

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.]

OSWEGO, N. Y., *Oct.* 5, 1869.

Messrs. DAVID DOWS & CO., *New York:*

GENTLEMEN: We have none of your favors to-day. We are shipping to-day per boats Harm and Post and E. D. Case, 15,460 bush. prime

No. 2 Mil. wheat; against the first we drew 115 c., but on receipt of western reports thought you might consider that too much, and so reduced it to 110c. on last, which we hope may be satisfactory. Please honor and oblige,

Yours truly,

A. F. SMITH & CO.

Copy draft attached to B. L. E. D. Case.

[U. S. int. r. stamp, 2 cents, cancelled.]

[A. F. Smith & Co., commission merchants.]

$8,426. OSWEGO, N. Y., *Oct. 5th*, 1869.

At sight pay to the order of J. T. Hill, cas., eighty-four hundred and twenty-six dollars.

A. F. SMITH & CO.

To Mess. DAVID DOWS & Co., *New York.*

(Endorsed:) Ninth National Bank New York, paid.

B. L. attached to above draft.

No. OSWEGO, *Oct. 5th*, 1869.

Shipped by A. F. Smith & Co., in apparent good order, on board canal-boat E. D. Case, of Fulton, Captain Smith, the following described property, to be transported to the place of destination, without unnecessary delay, and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges, as prescribed in this bill. Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather, after arrival and notice of 80 same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two per cent. per day upon the freight, (including tolls,) for each and every day of such demurrage, over the three days as above specified, until the cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo, to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay only for any deficiency (caused by heating) exceeding five bushels for each one thousand bushels.

The freight, charges, and demurrage payable to Sprague and Faville, or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

David Dows & Co., 7,660 bush. wheat, (No. 2 Mil.)
New York.
Ac. A. F. Smith & Co., E.
Freight hence to N. Y., 14 c. per bush.
(Signed) G. A. BENNETT.

(Endorsed:) A. F. SMITH & Co.

Certificate of insurance.

INLAND MARINE DEPARTMENT,

No. 5,687. *Oswego, Oct. 5th*, 1869.

This certifies that A. F. Smith & Co. insured under and subject to the condition of canal policy No. 173, issued by the Albany City Insurance Company, at the Oswego agency, in the sum of ten thousand dollars, on 7,660 bushels of wheat, at $ per bushel, inboard cargo of E. D. Case, to wit, , at and from to at per cent., $10,000, at and from Oswego to N. Y., at per cent., is $, which premium is hereby acknowledged to have been received. Loss (if any) payable to A. F. Smith & Co., or order hereon, and return of this certificate.

JAMES HENDRICKS,
Vice-President.

Countersigned at Oswego this 5th day of October, 1869.
A. F. SMITH & CO., *Agents.*

(Endorsed:) A. F. SMITH & Co.

Draft.

$8,970, No.] [No. 340.

[A. F. Smith & Co., commission merchants.]

[U. S. int. r. stamp, 2 cents, cancelled.]

OSWEGO, N. Y., *Oct.* 5, 1869.

At sight pay to the order of J. D. W. Case, cash., eighty-nine hundred and seventy dollars.

A. F. SMITH & CO.

To Messrs. DAVID DOWS & Co.,
New York.

81 (Endorsed.) Pay G. I Surry, esq., cashier, or order.
J. W. D. CASE, *Cashier.*

And stamped, received payment.
METROPOLITAN NATIONAL BANK.

(Stamped on face:) Paid Oct. 7, 1869.

B. L. attached to above draft.

No. OSWEGO, *Oct. 5th*, 1869.

Shipped by A. F. Smith & Co., in apparent good order, on board canal-boat Harm and Post, of , Captain Nicks, the following described property, to be transported to the place of destination, without unnecessary delay, and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges, as prescribed in this bill. Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather, after arrival and notice of same, to be allowed

consignees to discharge this cargo, after which time the cargo, or consignees, are to pay demurrage, at the rate of two per cent. per day upon the freight (including tolls) for each and every day of such demurrage over the three days as above specificed, until the cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo, to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay only for any defibiency (caused by heating) exceeding five bushels for each one thousand bushels.

The freight, charges, and demurrage payable to Sprague and Favill, or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

David Dows & Co., 7,800 bus. wheat.
Ac. A. F. Smith & Co.,
Freight to N. Y., 14 c per bush.
(Signed) G. A. BENNETT.

(Endorsed:) A. F. Smith & Co.

Certificate of insurance.

INLAND MARINE DEPARTMENT,
ALBANY CITY INSURANCE COMPANY,

No. 686. *Oswego, Oct. 5, 1869.*

This certifies that A. F. Smith & Co. insured under and subject to the conditions of canal policy No. 173, issued by the Albany City Insurance Company, at the Oswego agency, in the sum of ten thousand three hundred dollars, on 7,800 bushels of wheat, at $ per bushel, inboard cargo of Harm and Post, to wit, $ at and from to , at per cent., $10,300 at and from Oswego to N. Y., at per cent., to $, which premium is hereby acknowledged to have been received. Loss (if any) payable to A. F. Smith & Co., or order hereon, and return of this certificate.

82 JAMES HENDRICKS,
Vice-President.

Countersigned at Oswego this 5th day of Oct., 1869.
A. F. SMITH & CO., *Agents.*

(Endorsed:) A. F. SMITH & CO.

The witness continued: The Mine Dingman arrived in New York October 30, 1869, and we paid the freight from Oswego to New York, amounting to $1,146\frac{67}{100}$, and other charges and expenses, (these are stated above.) The wheat was sold by David Dows & Co., Nov. 4, 1869, from store. The date of the arrival of the boat Harm and Post, was Nov. 1, 1869. We paid the freight and other charges on the wheat by that boat. (They are above herein stated, and apportioned between the wheat from the schooners Thomas Parsons and Atmosphere respectively.)

The boat E. D. Case arrived here Nov. 1, 1869. We paid the freight and other charges on wheat by that boat. (They are above herein stated.)

The defendants' counsel here offered to read in evidence the letters or

as much of them as advised of the shipment and of the drawing of the drafts against the wheat shipped under each or any of the foregoing canal bills of lading in the name of A. F. Smith & Co. as the shippers, and for their account to David Dows & Co. as consignees, and offered in evidence the several bills of lading, with certificates of insurance attached, and the draft which was paid on the delivery of the bill of lading for the wheat against which it was drawn, beginning with the bill of lading of the boat Mine Dingman, dated Oswego, October 4, 1869, the certificate of insurance attached, and the sight-draft of A. F. Smith & Co., dated October 4, 1869, for $5,980, drawn against the wheat consigned by said B. L. to defendants.

The bill of lading showing shipment by the boat E. D. Case, dated Oswego, October 5, 1869, the certificate of insurance attached, and the sight-draft of A. F. Smith & Co., dated October 5, 1869, for $8,426, drawn against the wheat consigned by said B. L. to defendants.

The bill of lading showing shipment by the boat Harm and Post, dated October 5, 1869, the certificate of insurance attached, and the sight-draft of A. F. Smith & Co., dated October 5, 1869, for $8,970, drawn on the defendants against the wheat consigned by said B. L. to them.

The defendants offered this evidence for the purpose of showing title in them as consigners, by reason of their advances by payment of the sight-drafts made on the several consignments by bill of lading of the wheat shipped by A. F. Smith & Co. to the defendants, in connection with evidence that such advances were made in the usual course of business, and bona fide, and without notice of any claim of plaintiffs or of any other person thereto except A. F. Smith & Co., the shippers who were in possession.

The plaintiff's counsel objected to the reception in evidence of any of the said canal bills of lading or drafts attached; and as to the offer in evidence of the bills of lading of shipment by the Mine Dingman, and other documents attached, he insisted:

83 1st. That prior to the date of that bill of lading the plaintiff in this suit had acquired title to the wheat in question.

2d. That the plaintiff had given no authority to the Merchants' Bank at Watertown to deliver the wheat which went into this canal-boat from the lake schooner Thomas Parsons, and to transfer or deliver to A. F. Smith & Co. the title to the wheat, except upon the payment of all the drafts enclosed in the letter of the plaintiff in evidence to the Merchants' Bank.

3d. That by the undisputed evidence, all the drafts thus enclosed to the Merchants' Bank of Watertown had not been paid.

4th. That the Merchants' Bank had never delivered to A. F. Smith & Co. the wheat which went into the canal-boat Mine Dingman from the Thomas Parsons, under or by virtue of this alleged bill of lading.

5th. That this bill of lading purports to be a bill of lading of wheat, shipped by A. F. Smith & Co.; but by the undisputed evidence in this case, A. F. Smith & Co. had no lawful right or authority to ship the wheat mentioned in the bill of lading.

The counsel for the plaintiff insisted upon the like points as to the offer in evidence of the bill of lading of shipment by the boat E. D. Case, and documents attached; also as to the offer in evidence of the bill of lading of shipment by the boat Harm & Post, and documents attached.

After a lengthy discusssion by the counsel for plaintiff, upon documentary and other evidence relied upon by the plaintiff in support of the foregoing propositions and arguments in support of the objection of

the plaintiff, and the discussion by the defendants' counsel in opposition thereto upon the construction and effect of the documentary evidence, and on the effect of the delivery of the wheat purchased for account of A. F. Smith & Co., on board the lake vessels at Milwaukee, under the orders for the purchase and the arrangement under which such shipment was made, and of the delivery by the Merchants' Bank to transfer the title, and upon the circumstances attending and following the delivery of the wheat at the elevator of A. F. Smith & Co., and of the effect of the rightful possession of A. F. Smith & Co. in their warehouse, coupled with an interest as the buyer or general or beneficial owner, or holding at their risk as an authority to transfer the title as to bona fide purchasers, or as entitling the defendants as consignees on the shipments by A. F. Smith & Co. to them to a lien for their advances, either at common law or under the New York act relating to principals and factors.

And after further discussion of the evidence and argument in contravention of the claims of fact and law insisted upon by the plaintiff, and in opposition to the objection to the reception of the evidence offered, the judge ruled upon the objection in substance as follows:

My conclusion, in brief, upon the facts in the case, which I regard as uncontrovertable, is that Messrs. David Dows & Co., the defendants, could not by reason of any possession or interest which A. F. Smith & Co. had in the wheat before or on their shipment of it to defend-
84 ants, acquire any title to the wheat or lien thereon as against the plaintiff by advances bona fide made in paying any draft of A. F. Smith & Co., on the consignment of the wheat against which it was drawn by canal bill of lading to defendants as their consignees on delivery thereof to defendants. The facts, in my judgment, do not bring the case within the protection of the first section of the New York factor act, so called, which has been referred to.

I must, therefore, in conformity to the views of the circuit judge, as I understand them, in disposing of the case of the National Exchange Bank against these defendants, reject the evidence offered. In rejecting this evidence, I do so on the concession and the assumption that the defendants acted bona fide without knowledge or notice of anything to put them upon inquiry touching this matter.

The defendants did thereupon duly except to this decision rejecting the evidence offered.

The defendant's counsel further excepted to this exclusion of the evidence, as depriving the defendants of what they claimed to be their right to go to the jury on the question as to the authority of the Merchants' Bank to deliver this wheat to A. F. Smith & Co. on the evidence in the case, or in connection with further evidence which they propose to offer; and as to the true relation of A. F. Smith & Co. to this wheat under the arrangement under which it was purchased and shipped at Milwaukee.

The defendants further excepted to the conclusion involved in the rejection of the evidence, that there was nothing to go to the jury.

Defendants' counsel here offered to read in evidence the deposition of David Mannering, taken at Oswego, before U. S. Commissioner Getty, April 20, 1870, in respect to the character and uses of the elevating warehouses at Oswego, the business of A. F. Smith & Co., and the purposes for which they as proprietors of the Corn Exchange elevator used that elevator; and the evidence therein contained as to the general usage at Oswego in cases of consignments by B. L., with such drafts attached to banks at Oswego to place the consignments in the elevating warehouse of the merchant on whom such drafts are drawn, as follows:

DAVID MANNERING, having been duly sworn as aforesaid, did depose and say as follows:

I reside in Oswego, about three hundred miles from New York City; my age is fifty-two years; my occupation in September and October, 1869, was cashier of the City Bank of Oswego.

Q. How long have you resided in Oswego?

A. About nineteen years, and know this is a lake port at the mouth of the Oswego River.

Q. How large a portion of the business of Oswego consists of the receipt of grain purchased at the West, or in Canada, for sale at Oswego, or on commission, or for shipment from Oswego?

A. I think the grain business is the largest business done in Oswego.

Q. By whom, and what class of merchants is that business done?

85 A. By commission merchants.

Q. In the transaction of that business by commission merchants, are they generally possessed of a warehouse, with an elevator to take grain from vessels into the warehouse?

A. Most of them are.

Q. Are not the number of warehouses with an elevator, in which commission merchants at Oswego do their business, a peculiar feature of Oswego as a lake port?

A. I think it is.

Q. In reference to the quantity of wheat received on sale on commission or for shipment, how does Oswego rank with other lake ports?

A. Oswego ranks first on Lake Ontario, and next to Buffalo in this State.

Q. How many of those elevating warehouses are there in Oswego?

A. I should think there are ten or twelve. They are mostly on the east side of the river. There is one grain-elevator on the west side of the river.

Q. Have all these elevating warehouses some name?

A. Yes, sir.

Q. Are there any of these elevating warehouses at Oswego used exclusively for the receipt of grain for storage?

A. No, sir; I don't know of any.

Q. How long have you known the firm of A. F. Smith & Co.?

A. Two years, and since they came to Oswego.

Q. Have they kept an account at your bank?

A. Yes, sir.

Q. What was their business during these two years?

A. They were commission merchants and grain dealers, like the rest of those elevator men.

Q. Was the Corn Exchange elevator, the one used and occupied by A. F. Smith & Co., one such as you have described?

A. Yes, sir; they were proprietors of the Corn Exchange elevator; whether owners or not I do not know; but they were the sole occupants, and they did their business at that elevator.

This is offered for the purpose of ascertaining or helping to interpret the arrangement or order for the delivery of the wheat at the Corn Exchange elevator.

The plaintiff's counsel objected to the reading of this evidence as incompetent and irrelevant, the judge sustained the objection and excluded it, and the defendants excepted.

The defendants further offered to read in evidence the deposition of the witness, as follows:

Q. In 1868 and 1869, did you receive consignments by bills of lading,

for account of any other banks in Milwaukee, or other western banks, with drafts enclosed, drawn on other commission houses at Oswego than A. F. Smith & Co.?

A. Yes, sir; we did.

Q. In those cases, did or did not the wheat, on arrival at Oswego, go into the elevating warehouse, or through the elevator of the parties on whom the drafts were drawn after acceptance of the drafts?

86 A. Yes, sir; it did, when they had a warehouse.

Q. Was that the general usage at Oswego, in cases of consignments by bills of lading, with drafts attached, to banks at Oswego?

A. Yes, sir; I think it is, and was at that time.

This evidence of the general usage at Oswego in cases of consignment by B. L., with drafts attached, to banks at Oswego, to place the wheat on arrival at Oswego in elevating warehouse of the commission merchant or dealer in grain on whom the drafts are drawn, after acceptance of the drafts, is offered as evidence of a usage from which authority to the Merchants' Bank may be inferred, to place the wheat on arrival at Oswego with A. F. Smith & Co., in their warehouse, on or after they had accepted the drafts, which would not be affected by private instructions so far as A. F. Smith & Co. or third parties are concerned, or the public, if not notified of the instructions, and also for helping to interpret the meaning of the orders for the delivery of the wheat into the Corn Exchange elevator.

The plaintiff's counsel objected to this evidence as incompetent and irrelevant for either purpose, and also upon the further grounds that the usage which is offered cannot be admitted to control the relations between the parties to this transaction.

The judge excluded the evidence, and the defendants excepted.

The defendants here renewed the offer of the evidence of the execution of these canal bills of lading, and of their transmission to David Dows & Co., with drafts attached, and of the payment of these drafts and retaining the bill of lading in good faith and in accordance with the usual course of business as a foundation upon which to ask to go to the jury upon the question whether upon the evidence the arrangement between A. F. Smith & Co. and Geo. I. Jones & Co. for the purchase of the wheat shipped by the schooner Atmosphere, was not that A. F. Smith & Co. should have credit for the whole cost of the wheat, except such portion as was to be paid for by sight-draft, and be entitled to the possession and absolute ownership on payment of such sight-draft and the acceptance of the time-draft drawn for the residue of the cost, and to request this court to instruct the jury that if such was the arrangement, and that if the shipment was made for account and risk A. F. Smith & Co., under such arrangement the defendants, as bona-fide purchasers or consignees advancing in good faith on the shipment from Oswego by canal-boat by A. F. Smith & Co. to them of so much of said wheat as was so shipped by A. F. Smith & Co., would acquire a good title thereto as against the plaintiffs.

This offer is intended to raise the question as to the authority of the plaintiffs to impose the restriction as to delivery; also as to like authority of the Merchants' Bank.

The plaintiff's counsel objected to the admissibility, for any such purposes, on the grounds originally offered by them.

The judge sustained the objection and excluded the evidence, and the defendants' counsel excepted.

The defendants made the same offer with a view to a like request with respect to the wheat purchased and shipped for account A.

87 F. Smith & Co., by Oliver & Hart, by the schooner Thomas Parsons.

The plaintiffs made same objection, on the ground upon which they objected originally to the reception of the evidence.

The judge excluded it and the defendants excepted.

The defendants offered this evidence again, with a view to ask, and as giving them a standing to ask, to go to the jury on the question whether on the evidence the arrangement between A. F. Smith & Co. and Geo. I. Jones & Co. for the purchase of the wheat shipped by the schooner Atmosphere, was not that the same was to be bought for and on account of A. F. Smith & Co., with power only on the part of Geo. I. Jones & Co. to pledge the same so far as might be necessary to procure the means of payment by discounting the bills to be drawn on A. F. Smith & Co. for the costs and charges; and to request the court to charge the jury that if such was the arrangement and the wheat was shipped for account and risk of A. F. Smith & Co. thereunder, the general property of the wheat was in A. F. Smith & Co., subject only to the lien or special property of the plaintiffs as pledges.

Plaintiffs objected as before to the admission of the evidence for such purpose. The judge excluded it, and the defendants excepted. The defendants also offered this evidence with a view to a like request in respect to the wheat purchased and shipped for account A. F. Smith & Co. by Oliver & Hart, by the schooner Thomas Parsons.

The same objection, ruling, and exception.

The defendant' again offered this evidence as a foundation upon which to request the court to instruct the jury on their behalf that A. F. Smith & Co., having the general property in the wheat, if in an actual authorized possession at the time of each shipment by canal-boat, the defendants making advances to A. F. Smith & Co. on the faith of their possession and of the canal-boat bills of lading offered in evidence bona fide and without notice of any interest in the plaintiffs, acquired a property in the wheat or a lien thereon which is a defence to this action.

The plaintiffs objected to its reception, the judge excluded it, and the defendants excepted.

The defendants again offered this same evidence, with a view, in connection with that and the other evidence, to request the court to charge or to hold that the question, whether the wheat bought at Milwaukee for the account of A. F. Smith & Co., and shipped by the purchasing agent there, in the schooner Atmosphere, was shipped with a view of passing the property to A. F. Smith & Co., is a question of fact for the jury to determine; and also the question whether in such shipment under the circumstances there was an intention to reserve, or whether there was in fact reserved any interest beyond the mere right of retention for the payment of the draft drawn against it. And to ask the judge to instruct the jury if the intention to be collected from the evidence was to pass the property to A. F. Smith & Co., on the shipment in fulfillment of an order for the purchase and without the reservation of any other right than a mere lien or right of retention for the payment of the drafts, the only interest of the purchasing agent or
88 of the plaintiff as pledgee was that of the lien or right of retention, the preservation of which would depend upon retaining possession, and that by reason of the delivery by the Watertown Bank, which was the agent of the plaintiff, if authorized or under its orders, any lien or special property of the plaintiff on any parcel shipped by A. F. Smith & Co., under canal bills, consigning the same to defend-

ants for account of A. F. Smith & Co., was lost as against the defendants upon a transfer of the canal bill of lading to the defendants upon their advancing upon it, if bona fide and in the usual course of business.

The plaintiff objected, the judge excluded the evidence, and defendant excepted.

The defendants made the same offer as to the Parsons.

Same objection, ruling, and exception.

The defendants then asked for the admission of that evidence, to the end that they might go to the jury upon the question upon the evidence in the case and the evidence of usage offered, whether the bank at Watertown was authorized to deliver the cargo consigned to it by the Milwaukee Bank into the possession of A. F. Smith & Co., in their warehouse, and to ask the court to instruct the jury that upon proofs showing that the drafts were transmitted to procure the acceptance and for collection to a bank whose business it was to receive drafts, to procure their acceptance and collection, and to receive consignments by bill of lading as collateral; that the disposition of such consignment in and according to the usual course of business of such bank would be authorized as to third parties or the public without being affected by any private letter of instruction or undisclosed restrictions.

The plaintiff's counsel objected on the same grounds as above. The judge excluded the evidence, and the defendants excepted.

The defendants asked to introduce that evidence as a basis or footing on which to ask the court to instruct the jury in reference to the letters from the cashier of the Watertown Bank, dated September 27, 1869, addressed to A. F. Smith & Co., proprietors of the Corn Exchange elevator, enclosing order for delivery of the cargo to the Corn Exchange elevator; that these letters, so far as they are applicable, are to receive a construction most favorable to the party to whom they were delivered, and so as to give validity to the transfer of the wheat on shipment by canal-boats to the defendants, if they would admit of such a construction.

The plaintiffs objected as above; the judge excluded the evidence; the defendants excepted.

The defendants asked to introduce the evidence as giving them a footing for a request to charge that what these letters import is, that the wheat is to be delivered to A. F. Smith & Co., (referred to in the address as the proprietors of the Corn Exchange elevator, to show that they are the parties to whom the wheat was to be delivered, under the orders for a delivery to or at the Corn Exchange elevator,) and that A. F. Smith & Co., known to the bank to be dealers in grain and commission merchants, doing business at the Corn Exchange elevator, and the same persons upon whom the drafts were drawn, were to hold the wheat without any condition or restriction that they were to hold it as
89 warehousemen, and without any condition or restriction that A. F. Smith & Co. were to hold it as the property of the bank or otherwise than at their own risk.

The plaintiff objected as above, the judge excluded the testimony, and defendant excepted.

The defendant offered it again with a view to a further request of the judge to charge that all that the instruction or direction in these letters that the wheat is to be held by you for us, until the following drafts are paid necessarily imports is, that it is to be held for us (Merchants' Bank) as security for, or for our account generally, for the payment of the drafts, without any restriction upon its disposition for the payment of the drafts.

The plaintiffs objected as above. The judge excludes the evidence, and defendants excepted.

And for a further request, that if the court declined so to charge as last requested, the defendants may go to the jury in the light of the surrounding circumstances, and the course of dealing between the Merchants' Bank and A. F. Smith & Co., if that was not the true construction.

The plaintiff objects as above, the judge excludes the evidence, and defendants excepted.

The defendants asked to introduce that evidence as a foundation for a request to go to the jury upon the question, whether the intent inferable from the effect of delivering the wheat into the possession of A. F. Smith & Co., in their warehouse, was not to put the same at their risk as the general owners, and to ask the court to instruct the jury that if this was so, that A. F. Smith & Co. were not holding the wheat as simple bailees for storage only.

The plaintiffs objected as above, the judge excluded the evidence, and defendants excepted.

Next, as a foundation for the request to the court, with the other evidence in the case, to instruct the jury that any condition annexed to delivery by the Watertown Bank to A. F. Smith & Co., to hold the property for us until the drafts were paid, rested in contract only, and did not affect the property in the wheat upon transfer to third parties as bona-fide purchasers.

The plaintiff objected, the judge excluded the evidence, and the defendants excepted.

Further, a foundation upon which to ask the court to go to the jury upon that, with the other evidence in the case, upon the question, whether the shipment by A. F. Smith & Co. for advances was not to be considered as made by permission of the Watertown Bank.

Plaintiff objects; the judge excludes the evidence; defendant excepts.

Also as a foundation upon which to ask the court to instruct the jury upon that, with the other evidence in the case, that if A. F. Smith & Co. were in the lawful and rightful possession of the wheat of which they were the general owners at the time of the shipment of any of the parcels consigned to the defendants, and holding the same at their risk, although charged with some trust or condition for the payment of the drafts against them, the defendants, as holders under the canal-
90 boat bills of lading, would acquire a title to the wheat by their advance on consignment by bill of lading made upon transfer of the canal bill, if bona fide, and such title would be valid as against the plaintiffs.

The plaintiffs object, the judge excludes the evidence, and defendants except.

And then, also, for the purpose of asking the court, in connection with the evidence in this case, to charge the jury that A. F. Smith & Co., being in the lawful actual possession, coupled with an interest as the general owners of the wheat at the time of the shipment from Oswego, the defendants, as their consignees, advancing in good faith, without notice of any claim by the plaintiffs, are within the protection of the first section of the New York act relative to principals and factors or agents.

Plaintiffs make same objection, the court excludes the evidence, defendants except.

As to the damages, the defendants ask the court to charge the jury,

that if the plaintiffs are entitled to recover in this action the value of either of these parcels of wheat, that in ascertaining such value the freight and other charges for storage, screening, and blowing, and other charges paid by the defendants thereon in New York, are to be deducted, and if the court shall charge that the freight paid is not to be deducted, then we ask the court to charge that the other charges for taking care of the property should be deducted.

Further, as to the damages, the defendants requested the court to charge that the claim of the plaintiffs, if entitled to recover in respect to any parcel, will be limited as to such parcel to their interest for amount of unpaid drafts on any particular cargo of which it formed a part, not exceeding the value of the particular parcel.

The COURT. I understand this to be conceded by the plaintiffs.

The defendants further request the court to charge, that in respect to any particular parcel the amount due upon the cargo of which it was a part, should be pro rated in proportion to the number of bushels of such parcel to the whole cargo, and the recovery limited by such pro rating in respect of the particular parcel. The judge refused so to charge, and defendants excepted.

The defendants also requested the court to charge that the allowance of interest is in the discretion of the jury. The court refused so to charge, and defendants excepted.

The plaintiff's counsel states its claim as follows:

Draft unpaid on cargo Tho's Parsons of 18,734.$\frac{27}{60}$ bush., dated Sept. 22, 1869, at 20 days after date, for $19,462.14.		
It claims for, on the Mine Dingman, 7,900 bushels, and		
for, on the Harm and Post, 3,434$\frac{27}{60}$ "		
In all.....	11,334$\frac{27}{60}$ "	
from the Tho's Parsons, and are charged for this at $1.28, amounting to.....		$14,507 52
Interest 3 years and 20 days.....		3,102 21
		$17,609 73
91 It holds time draft, unpaid of the Atmosphere, date Sep. 23, 1869, at 30 days after date, for $14.472.15, amounting with interest to.....		17,595 55
		$35,205 28
The quantity it claims from the Atmosphere, on boat Harm and Post.....	4,365$\frac{33}{60}$ bushels,	
On E. D. Case.....	7,660 "	
In all.....	12,025$\frac{33}{60}$ bushels.	
Of 14,805.$\frac{47}{60}$ cargo of the Atmosphere, charging this at $1.28, and adding interest, amount to $18,683.43. This amount exceeding amount unpaid draft and interest against cargo Atmosphere, the plaintiff claims amount said unpaid draft and interest..		17,595 55
And for wheat from Parsons cargo, at $1.28, and int.....		17,609 73
Footing up.....		$35,205 28

The judge then charged the jury as follows:

Gentlemen of the jury: You have noticed, of course, the direction that this case has finally taken. It has been deemed by the court to be its duty to dispose of this case on the ground that the conceded or, at least in my view, uncontrovertible facts in the case raise only a question of law which it is the duty of the court to dispose of. You are aware that in this court, the court is the exclusive judge of the law, as the jury are the exclusive judges of facts. The counsel for the defendants think that the court has failed to appreciate the suggestions which they have made, and that there are facts in the case which the court ought to have submitted to the jury, and taken their finding thereon. The court, not having come to that conclusion, but believing that this controversy turns, not upon a question of fact that is controvertible, but upon the question of law arising out of uncontrovertible facts, the court feels it its duty to dispose of this case itself, and it therefore directs you to return a verdict for the plaintiffs for ($35,205.28) thirty-five thousand two hundred and five $\frac{28}{100}$ dollars.

The defendants excepted to the charge of the judge to the jury, as a direction to them to find a verdict for the plaintiff.

Also they except to the charge as a direction to find a verdict for the amount directed, so far as that amount included freight, storage, interest, and other charges specifically objected to and enumerated above, and as to each of them.

The jury, as directed, found a verdict for the plaintiff for ($35,205.28) thirty-five thousand two hundred and $\frac{28}{100}$ dollars.

And because none of the said exceptions so offered and made to the opinions and decisions of the said circuit judge do appear upon the record of said trial, therefore, on the prayer of the said defendants, by their counsel, said judge hath to this bill of exceptions set his hand and seal, pursuant to the statute and the rules and practices of this court, on the 15th day of January, 1873, as yet of the October term, 1872.

WM D. SHIPMAN, [L. S.]
Judge.

92

93 Supreme Court of the United States.

DAVID DOWS, JOHN DOWS MAIRS, AND ALEXander Ector Orr, plaintiffs in error,
vs.
THE WISCONSIN MARINE AND FIRE INSURANCE Company, defendant in error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-three.

Afterwards, to wit, on the 2d Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, come the said David Dows, John Dows Mairs, and Alexander Ector Orr, by C. Van Santvoord, their attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit,

94 that the declaration aforesaid and the matters therein contained are not sufficient in law for the said The Wisconsin Marine and Fire Insurance Company to have or maintain its aforesaid action thereof against the said David Dows, John Dows Mairs, and Alexan-

der Ector Orr; there is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for said The Wisconsin Marine and Fire Insurance Company against the said David Dows, John Dows Mairs, and Alexander Ector Orr, whereas, by the law of the land the said judgment ought to have been given for the said David Dows, John Dows Mairs, and Alexander Ector Orr, against the said The Wisconsin Marine and Fire Insurance Company. And the said David Dows, John Dows Mairs, and Alexander Ector Orr pray that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed and annulled and altogether held for nothing, and that they *they* may be restored to all things which they
95 have lost by occasion of said judgment.

C. VAN SANTVOORD,
Attorney for Plaintiff in Error.

(Endorsed:) U. S. Supreme Court. David Dows, John Dows Mairs, and Alexander Ector Orr, plaintiffs in error, vs. The Wisconsin Marine and Fire Insurance Company, defendant in error. Assignment of error. C. Van Santvoord, att'y for pl'ffs in error. Filed Ap'l 26, 1873.

96

97 *Bond for damages & costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

THE WISCONSIN MARINE AND FIRE ISURANCE Company
vs.
DAVID DOWS, JOHN DOWS MAIRS, AND ALEXander Ector Orr.

Know all men by these presents that we, David Dows, John Dows Mairs, Alexander Ector Orr, Josiah M. Fiske, and William H. Mairs, are held and firmly bound unto the above-named The Wisconsin Marine & Fire Insurance Company in the sum of seventy-three thousand three hundred dollars, to be paid to the said The Wisconsin Marine & Fire Insurance Company, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas the above-named David Dows, John Dows Mairs, & Alexander Ector Orr have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named David Dows, John Dows Mairs, & Alexander Ector Orr shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then this obligation

shall be void, otherwise the same shall be and remain in full force and virtue.

DAVID DOWS. [L. S.]
JOHN D. MAIRS. [L. S.]
A. E. ORR. [L. S.]
JOSIAH M. FISKE. [L. S.]
W. H. MAIRS. [L. S.]

Sealed and delivered, and taken and acknowledged, this 24th day of April, 1873, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

98 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Josiah M. Fiske and William H. Mairs, being duly sworn, each depose and say that he is worth the sum of seventy-three thousand three hundred dollars, over and above all his just debts and liabilities.

JOSIAH M. FISKE.
W. H. MAIRS.

Sworn to this twenty-fourth day of April, A. D. 1873, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

(Indorsed:) Vol. page . U. S. circuit court. The Wisconsin Marine & Fire Insurance Company vs. David Dows, John Dows Mairs, & Alexander Ector Orr. Bond for costs and damages. C. Van Santvoord, att'y for def'ts. Filed this 25 day of Ap'l, 1873.

This bond approved as to form and amount and sufficiency of sureties.

New York, April 25, 1873.

SAM'L BLATCHFORD.

Filed April 25, 1873.

99 *Citation.*

U. S. circuit court, southern district of New York.

DAVID DOWS, JOHN DOWS MAIRS, AND ALEXander Ector Orr, plaintiffs in error,
vs.
THE WISCONSIN MARINE & FIRE INSURANCE Company, defendant in error.

By the honorable Samuel Blatchford, judge of the circuit court of the United States for the southern district of New York, in the second circuit.

To the above-named The Wisconsin Marine and Fire Insurance Company:

Whereas the above-named David Dows, John Dows Mairs, and Alexandria Ector Orr have lately brought a writ of error to the Supreme Court of the United States from a judgment lately rendered in the circuit court of the United States for the southern district of New York,

in the second circuit, in favor of said The Wisconsin Marine and Fire Insurance Company against the said David Dows, John Dows
100 Mairs, and Alexander Ector Orr, for the sum of thirty-six thousand six hundred and thirty-eight $\frac{74}{100}$ dollars damages and costs, and have filed said writ of error with the clerk of said circuit court, and have also given and filed the security required by law for the prosecution of said writ of error to effect, and to answer all damages and costs if they fail to make their plea good:

You are therefore hereby cited to appear before the said Supreme Court of the United States at the city of Washington, on the second Monday of October next, the return-day of said writ of error in the October term of said court, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 25th day of April, 1873, and of the Independence of the United States the ninety-seventh.

SAM'L BLATCHFORD.

We admit due and timely service of the above citation this 26 day of April, 1873.

PORTER, LOWREY & SOREN,
Pl'ff's Att'ys.

101

102 (Indorsed:) U. S. circuit court. David Dows, John Dows Mairs, & Alexander Ector Orr, plaintiffs in error, vs. The Wisconsin Marine & Fire Insurance Company, defendants in error. Citation. C. Van Santvoord, att'y for pl'ffs in error. Filed Ap'l 26, '73.

(Indorsement on cover:) No. 436. David Dows, John Dows Mairs, and Alexander Ector Orr, plaintiffs in error, vs. The Wisconsin Marine and Fire Insurance Company. S. New York C. C. U. S. Filed 19th May, 1873.

REC. 436—6

U. S. Supreme Court.

DAVID DOWS, JOHN DOWS MAIRS, AND ALEX
ANDER ECTOR ORR,

Plaintiffs in Erro

against

THE WISCONSIN MARINE AND FIRE INSURANC
COMPANY,

Defendant in Erro

Brief of Defendant in Error.

H. M. FINCH,
Counsel.

U. S. SUPREME COURT.

DAVID DOWS, JOHN DOWS MAIRS, and ALEXANDER ECTOR ORR,
Plaintiffs in Error,
against
THE WISCONSIN MARINE and FIRE INSURANCE COMPANY,
Defendant in Error.

STATEMENT OF THE CASE.

This was an action of trover instituted by the Wisconsin Marine and Fire Insurance Company, a corporation created by and organized under the laws of Wisconsin, and having its place of business in Milwaukee in that State, in the Circuit Court of the United States for the Southern District of New York, to recover damages for the alleged conversion by Dows & Co., of twenty-six thousand one hundred and eighty-five 14-100 bushels of wheat, which the bank claimed as its property.

The cause was tried before the Hon. WILLIAM D. SHIPMAN, and resulted in a verdict in favor of the bank of thirty-five thousand two hundred and five dollars and twenty-eight cents.

The wheat in question was originally purchased in the city of Milwaukee by the firms of Oliver & Hart and Geo. I. Jones & Co., upon orders received from the firm of A. F. Smith & Co., of Oswego, N. Y.

Oliver & Hart purchased on or about the 22d day of September, 1869, eighteen thousand seven hundred and fifty-four 50/60 bushels No. 2 Milwaukee wheat, and delivered it on that day on board the schooner Thomas Parsons. They received from the Captain triplicate bills of lading. On receipt of the bills of lading, they drew two drafts on A. F. Smith & Co., one a sight draft for $3,750, the other a time draft for $19,462.74, payable twenty days after date. They also procured insurance upon the cargo. The bill of lading consigns the property to the "account and order D. Ferguson, cashier." (page 5.) Oliver & Hart delivered the original bill of lading with the drafts attached thereto, and the certificates of insurance, to the bank. The bank discounted the drafts on the faith of the bill of lading, and placed the proceeds of the discount to the credit of Oliver & Hart.

D. Ferguson was the cashier of the bank. He enclosed the bill of lading and drafts in a letter, dated Milwaukee, Sept. 22d, 1869. addressed to Merchants Bank, Watertown N. Y. (Page 6.) That letter describes the drafts and bill of lading, and instructs the bank "to hold the bill of lading for our account till payments of the drafts." The bill of lading was indorsed by Ferguson, "without recourse."

Geo. I Jones & Co. purchased on or about the 23d day of September, 1869, fourteen thousand eight hundred and sixty-seven bushels of wheat and delivered the same on board the schooner Atmosphere, receiving from the captain a bill of lading, making the wheat therein mentioned, deliverable to the "account of D. Ferguson, cashier or order, care Merchants Bank, Watertown, at Oswego, N. Y." (Page 9.) They drew two drafts on A. F. Smith & Co., one at sight for $3,750.00, and one for $14,472,15, payable thirty days after date. They delivered the also procured insurance upon the cargo. They delivered the drafts with the bill of lading and certificates of insurance to the bank. The bank discounted the drafts on the faith and credit of the bill of lading. The bank, by its assistant cashier, en-

closed the drafts, bill of lading, and certificates of insurance, in a letter addressed to the Merchants Bank, Watertown, N. Y., with instructions to hold the property "on our account until the draft is paid."

The Merchants Bank acknowledged the receipt of the drafts and bills of lading, by letter dated Sept. 27th, 1869. (page 6.)

The Merchants' Bank is located at Watertown, New York, some sixty miles or more distant from Oswego.

On the 27th day of September, 1869, the cashier of this bank enclosed to A. F. Smith & Co., "for acceptance and return," the drafts drawn on them by Oliver & Hart, and George I. Jones & Co. (Page 41.) At the same time and by same mail the bank forwarded the two letters addressed to "A. F. Smith & Co, proprietors Corn Exchange Elevator, Oswego, N. Y.," copies of which are printed on page 44, of the printed case. The letters are in the same language, differing only in names of captain and vessel and amount of wheat. One of the letters reads as follows:

SEPTEMBER 27th, '69.

A. F. SMITH & Co.,

Proprietors Corn Exchange Elevator, Oswego, N. Y:

DEAR SIRS: I enclose herewith an order to deliver to you the cargo of the schooner Atmosphere, 14,867 bushels of No. 2, Milwaukee spring wheat, consigned by us to D. Ferguson, cashier, Milwaukee, Wis., and is to be held by you for us until the following draft is paid:

"George I. Jones & Co. on A. F. Smith & Co., October 26th, $14,472.15"

The order enclosed in the letter reads as follows:–(Page 36).

MERCHANTS BANK, WATERTOWN, N. Y. Sept. 27th, 1869.

J. ANDERSON, ESQ.,

Master Schooner Atmosphere,

Oswego, N. Y.

DEAR SIR: Please deliver your cargo of 14,857 bushels of No. 2 Milwaukee spring wheat in the Corn Exchange Elevator

Oliver & Hart purchased on or about the 22d day of September, 1869, eighteen thousand seven hundred and fifty-four $^{50}/_{60}$ bushels No. 2 Milwaukee wheat, and delivered it on that day on board the schooner Thomas Parsons. They received from the Captain triplicate bills of lading. On receipt of the bills of lading, they drew two drafts on A. F. Smith & Co., one a sight draft for $3,750, the other a time draft for $19,462.74, payable twenty days after date. They also procured insurance upon the cargo. The bill of lading consigns the property to the "account and order D. Ferguson, cashier." (page 5.) Oliver & Hart delivered the original bill of lading with the drafts attached thereto, and the certificates of insurance, to the bank. The bank discounted the drafts on the faith of the bill of lading, and placed the proceeds of the discount to the credit of Oliver & Hart.

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The order enclosed in the letter reads as follows:–(Page 36).

MERCHANTS BANK, WATERTOWN, N. Y. Sept. 27th, 1869.

J. ANDERSON, ESQ.,

Master Schooner Atmosphere,

Oswego, N. Y.

DEAR SIR: Please deliver your cargo of 14,857 bushels of No. 2 Milwaukee spring wheat in the Corn Exchange Elevator

of Oswego, N. Y., for the account of D. Ferguson, cashier, subject to the order of the bank.

J. M. MOFFATT.

The "order" to the master of the Thos. Parsons is in the same language except as to name of vessel and amount of wheat.

All of these letters were received by A. F. Smith & Co., and the orders delivered to the captains. (Page 52.)

Letters were written by Oliver & Hart, and George I. Jones & Co. to A. F. Smith & Co. on the day of the purchase of the wheat enclosing invoice and account of purchase. No bill of lading and no copy of a bill of lading was ever sent to A. F. Smith & Co.

The Thos. Parsons arrived at Oswego about the 2d of October, 1869, and discharged her cargo into the Corn Exchange Elevator. The Atmosphere arrived at Oswego about the same date and discharged her cargo into the Corn Exchange Elevator.

A F. Smith & Co. were the proprietors of the Corn Exchange Elevator. The elevator is a large warehouse on the Oswego River, and is fitted up with machinery for loading and unloading grain, and with large bins for storing grain. It has storage capacity for 250.000 bushels. A. F. Smith & Co. received grain into the elevator simply for storage. (Page 51.)

A. F. Smith & Co, on receipt of the letters and orders from the Merchants Bank, paid the sight drafts and accepted the time drafts. They returned the time drafts, accepted, to the Merchants Bank without expressing any dissent to the terms and conditions upon which the wheat was to go into the Corn Exchange Elevator.

On the receipt of the wheat into the elevator, A. F. Smith & Co. shipped it without the knowledge or consent of the Merchants Bank, into canal boats, obtained from the captains of the canal boats bills of lading, drew drafts upon Dows & Co., and attached the drafts to these bills of lading, and sent them

forward to be presented to Dows & Co. for payment. Dows & Co. paid the drafts upon the faith of the bills of lading.

The Wisconsin Marine and Fire Insurance Company, learning of the shipment of the wheat, at once took proper steps to notify Dows & Co that it was its property. Prior to the commencement of this suit the bank caused a demand to be made upon Dows & Co. for the wheat. They refused to deliver it except upon the condition that their advances to A. F. Smith & Co. and other charges were paid, &c.

On such refusal this suit was commenced. The presiding Judge ruled that the legal title of the wheat was in the Milwaukee Bank; that Dows & Co. had no claim upon it as against the bank, and, there being no dispute as to the amount due under that ruling, he directed a verdict in favor of the bank for the amount so admitted to be due.

ARGUMENT.

The case presents the question so often brought before courts, which one of two innocent persons must suffer the loss occasioned by the knavery and rascality of a third party. That the shipment of this wheat to Dows & Co. by A. F. Smith & Co was a tortious, if not a felonious act cannot be questioned. Messrs. Dows & Co. advanced their money upon the faith of the bills of lading, signed by the captains of the canal boats, which recited that A. F. Smith & Co. were the shippers. They trusted to papers which were never issued by the Milwaukee Bank, or its authorized agent, which were only symbols of the property, which simply represented the property. In other words Dows & Co., had, by the bills of lading, just as much to rely upon, and no more, as they would have had, had they been present in the Corn Exchange Elevator and saw the wheat shipped out of the bins in which it was placed into the canal boats, and then made these advances upon the faith of the mere representations of A. F. Smith & Co. that they owned the wheat. An unauthorized bill of lading, of itself, has no power to pass away from an owner his property. To have any

effect to accomplish that purpose, a bill of lading must be issued with the knowledge or consent of the owner of the property covered by it. A warehouseman, holding wheat simply for storage, has no right to ship, without authority, the property left with him. Such a shipment can confer no title upon his consignee as against the true owner. Dows & Co acquired by the bills of lading just the title—none other or different—that A. F. Smith & Co. had to give. If A. F. Smith & Co. had a legal right, to ship the wheat in their own name, which, by the order of the Merchants Bank, was to be deposited by the Masters of the schooners Thos. Parsons and Atmosphere into the Corn Exchange Elevator, for the account of David Ferguson, cashier, subject to the order of the Merchants Bank, without the knowledge or consent of Ferguson or the Merchants Bank, then Dows & Co., (if the Merchants Bank had authority to give the order to thus store the wheat,) got the title to it by the bills of lading, signed by the captains of the canal boats. But if the shipment of A. F. Smith & Co. was without authority of the owner or its agent, was a tortious or felonious act, then Dows & Co. acquired no title.

In a case like this, where both parties are innocent, the rules of law are to be strictly applied. In the language of Judge SPENCER, in Palmer vs. Hand, 13 Johns 436, "this is a contest between two honest men who shall be the dupe of a swindler. The strict rule of law must therefore be applied."

In order to see clearly where the legal title to this wheat was on the day that Dows & Co. made their advances on the faith of the bills of lading forwarded to them by A. F. Smith & & Co., I propose to trace it step by step from its original purchase.

I.

Oliver & Hart, and George I. Jones & Co. were voluntary agents to purchase the wheat, and in that relation had a right to secure themselves for their advances by shipping the wheat as they pleased.

The Frances, (Dunham & Randolph claim,) 9th Cranch, 183.

The San Jose Indiana, (Lizan claimant,) 1st Wheaton, 208.

Gilbert vs. Guignon, Law Reports, 8th Ch. Appeal Cases, 20.

II.

The shipping the said wheat, and taking the bills of lading making the property deliverable to the order and for the account of D. Ferguson, cashier, and the procuring of the discount of the drafts, and delivering the bills of lading to Ferguson, cashier, was a distinct and conclusive declaration on the part of Oliver & Hart, and George I. Jones & Co. that they did not intend to make a delivery of the wheat covered by said bills of lading to A. F. Smith & Co. without payment of the money advanced by them for its purchase.

This proposition is settled by too many cases to be now successfully controverted. Had the wheat been delivered on board of vessels chartered or owned by A. F. Smith & Co., and the bills of lading taken in the form they were, A. F. Smith & Co. could not have claimed it as their property without complying with the conditions imposed by the Milwaukee Bank, or without the consent of that bank or its authorized agent. The terms of the bills of lading make that proposition too clear for doubt.

The Aurora, 4th C. Robinson, 218.

The Francis, 8th Cranch Rep., 354.

The Merrimack, 8th Cranch Rep., 317.

The Francis, (Irvin's claim) 8th Cranch, 418.

The San Jose Indiana, 1st Wheaton, 208.

Seymour vs. Newton, 105 Mass., 273.

Cayuga Bank vs. Daniels, 47 N. Y., 632.

Turner vs. Trustees Liverpool Docks, 6 Exch., 543.

Ward vs. Taylor, 46 Ills., 494.

Shepard vs. Harrison, Law Reports, 4th Q. B., 195.
Shepard vs. Harrison, Law Reports, 6th Q. B., 796.
Bailey vs. Hudson R. R. Co., 49 N. Y., 75.
Pomeroy vs. Wills, July number, 1873, of the American Law Record, page 1.
Tilden vs. Minor, 45 Vt., 96.
Wait vs. Baker, 2d Exch., 1.
Jenkins vs. Usborne, 49 Eng. Com. Law, 698.
Williams vs. Littlefield, 12 Wend., 362.
Moakes vs. Nicholson, 115 Eng. Com. Law, 296.
Ellershaw vs. Magniac, 6th Exchequer, 570.
Jenkins vs. Brown, 68 Eng. Com. Law, 495.
Brandt vs. Bowlby, 2d B. and Ald., 632.
Hoare vs. Dresser, 7th House of Lords Cases, 290
Moakes vs. Nicholson, 115 Eng. Com. Law, 290.

These authorities are directly to the point that Oliver & Hart and Geo. I. Jones & Co. intended by the method which they adopted in shipping this wheat to retain the title to it, until the drafts drawn against it were paid. To that end and for that purpose they procured the drafts to be discounted by, and gave the title (by the terms of the bill of lading) to the Milwaukee Bank. They made no reservations or exceptions in the transfer. They made an absolute transfer of the title to the Milwaukee Bank. The bank was left free to impose such terms and conditions as it saw fit, to pass the title of the wheat. Its power was in no way limited or controlled. Its money had paid for the wheat, and it alone was authorized to say upon what terms it would part with the title and possession.

III.

By the discounting of the drafts and the receipt of the bills of lading from the original shippers, the Milwaukee Bank became vested with a title to the wheat which was "good as against all the world."

Conrad vs. Ins. Co., 1st Peters, 445.
Wardwell vs. Patrick, 1st Bosworth, 406.
City Bank vs. R. W. & O. R.Co., 44 N. Y., 136.
Cayuga Bank vs. Daniels, 47th N. Y. 632.
Marine Bank vs. Wright, 48 N. Y., 1.
The Thames, 14th Wallace, 98.
Hoare vs. Dresser, 7th House of Lords Cases, 321.

The legal title to the wheat, when it left the city of Milwaukee, by the law of these authorities, was in the Milwaukee bank; the Milwaukee bank alone had the insurable interest in the cargo; it only had the power to say when and how the cargo should be disposed of; it only could have sued the carrier for any loss or damage to the wheat while in transit. A. F. Smith & Co. at this time had received no invoice, had paid no money, had accepted no drafts. It was not at this time known that they would pay any money, or accept any drafts. Their relations with Oliver & Hart, and Geo. I. Jones & Co. rested only in contract. The language of GROVER J. in Cayuga Bank vs. Daniels, 47 N. Y., 637 is in point. "The prior agreement to ship the property, confers no title upon the consignee. The owner may violate his agreement and not ship the property at all, or if he ships may consign it to another person. In either event no title is ever acquired by virtue of the unexecuted agreement to ship. If such an agreement was, as in the present case, made upon a good consideration, an action may be maintained for its breach by the party injured, but no title is acquired. This shows that it is not the agreement to ship that confers the title, although such agreement is founded upon a good consideration, but the actual shipment accompanied by an unconditional consignment, in pursuance of such agreement which proves that the delivery to the carrier was with intent to give the consignee a right of property, free from any condition whatever, the owner of the property being free to ship the property or not, and if he ships to consign the same to one with whom he has made a prior agreement to consign the same

to him or to another, it follows that if he consigns to the former he may impose any conditions upon the consignment he chooses, and that such consignee can acquire title to the property only by performing such conditions." The title to the wheat, at the time of the shipment, clearly was in the Milwaukee Bank, by the acts of the original shippers and by the terms of the bills of lading.

IV.

The Milwaukee Bank, having the absolute title to the wheat, selected the Merchants Bank as its special agent for the special purpose of holding the wheat for its account until the drafts were paid, and upon payment to deliver it to A. F. Smith & Co.

The Merchants Bank accepted the agency, and, carrying out its letters of instruction, notified A. F. Smith & Co. by letter, of the exact terms and conditions upon which they could become vested with the title and possession of the wheat.

These letters are written in plain and unambiguous language, and are to be construed by the court.

Brook vs. Hook, Law Rep. 6 Ex. 93.
Ranney vs. Higby, 5 Wis. 70.
Esser vs. Lindermann, 71st Penn. 80.
United States vs. Shaw, 1st Clifford 321.
Goddard vs. Foster, 17 Wal. 142.
Midland R. Co. vs. G. W. R. Co., Law Rep. 8th, Ch. Appeal Cases, 854.

The letters, and orders enclosed in them, in terms, announce to A. F. Smith & Co. that the wheat is to be delivered into the Corn Exchange Elevator, for the account of David Ferguson, cashier, subject to the order of the Merchants Bank, until payment of the drafts. The letters and orders were all received by A. F. Smith & Co. before they paid any of the sight drafts or accepted any of the time drafts drawn by Oliver & Hart, or George I. Jones & Co. "A. F. Smith & Co.," in the language of Judge WOODRUFF, in National Exchange Bank of Milwau-

kee vs. David Dows, et. al. page 157 of the printed case, "received the grain into the elevator with the knowledge that the delivery was not absolute, that it was not placed in their hands as owners, and that thereby they were not to acquire title. If they were not satisfied to accept the drafts upon those conditions they were quite at liberty to refuse them, they were quite at liberty to say, and then and there was the time and place to say it, we never authorized the purchase or shipment to us, or the drafts to be drawn upon us accompanied by the condition that the wheat should not come into our hands and be under our complete control on our acceptance of the drafts, that by making acceptance of the drafts, with that knowledge they consented to receive the wheat not as owners or as purchasers, but they took it as warehousemen, and with no title to it whatever except the right to pay the drafts, and so become invested with a legal title".

This view is fully sustained in the case of Davison vs. City Bank, which arose out of the same transaction. Justice MULLINS says: "The bank did receive the wheat from the vessels and directed it to be deposited in the Corn Exchange Elevator subject to its order. When in the elevator, therefore it was in the custody and under the control of the defendant." EARL, Com., in the same case, on appeal, says: "If the bank accepted the wheat by directing it to be delivered to the elevator subject to its order, the wheat after such delivery remained under its control, and it had all the possession it could take or be expected to have."

See also Hoare vs. Dresser. 7th House of Lords Cases, 290, 328–9.

Dent vs. N. Y. Steamship Co., 49 N. Y., 301.

Wolf vs. Gardiner, 12th Cushing, 19.

A. F. Smith & Co. are concluded by the contract they entered into with the Milwaukee Bank. They could not accept the wheat and reject the conditions imposed upon its acceptance. They are estopped from now claiming or asserting that they did not

receive the wheat into the Corn Exchange Elevator, for the account of David Ferguson, cashier, subject to the order of the Merchants Bank, until the drafts against it were paid. They cannot accept so much of the contract as is in their favor, and reject such parts as are not in their favor. They cannot affirm one part of the contract and disaffirm another part. "No person," says Hermann on Estoppel, title election, "shall be allowed at once to benefit by and repudiate an instrument, but if he chooses to take the benefit which it confers, he shall likewise take the obligations or bear the onus which it imposes. No person can accept and reject the same instrument."

The wheat when in the Corn Exchange Elevator, under the orders and directions of the Merchants Bank, was as much in the custody and possession of that bank as if it had been deposited in any other warehouse in Oswego. A. F. Smith & Co. at the time of shipment had no title to the wheat. They were as powerless to sell or dispose of the wheat while in that elevator without the order of the Merchants Bank, as they would have been had the wheat been stored in any other of the ten or twelve elevators in Oswego. It is conceded that no order was given by the Merchants Bank for its shipment. A shipment without an order from Ferguson or the Merchants Bank was a conversion of the wheat. (49 N. Y. 196.) A. F. Smith & Co., without an order, by an act which was tortious, if not felonious, shipped the wheat thus stored in the Corn Exchange Elevator to Dows & Co., sending them bills of lading signed by captains of canal boats, reciting that they (A. F. Smith & Co.) were the shippers. These bills of lading are the only title of Dows & Co. to this wheat. They claim that they acted in good faith and without notice, and paid out their money on the faith of these bills of lading. They say they have the title as against the Milwaukee Bank, not only by the rules of the common law, but by the provisions of the so-called factor's act of the State of New York.

V.

It is clear that Dows & Co. acquired no title to the wheat as against the Milwaukee Bank by the rules of the common law. If the letters of the Merchants Bank to A. F. Smith & Co. and the orders enclosed in them to the captains of the lake vessels, can, by any possibility, be construed as an absolute delivery of the wheat, by it or its cashier, to A. F. Smith & Co., then the delivery was an unauthorized act. The Merchants Bank had no power to make any such delivery until the drafts were paid. Whoever obtained the wheat from the Merchants Bank was bound to know the extent of its powers. That bank was a special agent appointed for a special purpose to perform a particular act with a special named party. It would be impossible to conceive of a more limited agency. It had no power to sell or pledge the wheat. It had no power to deliver the wheat until the drafts were paid. The letters of instruction to it were "TO HOLD for our account until the draft is paid." This is far from being an authority to deliver the wheat before payment. One of the bills of lading, on its face, reads: "Account David Ferguson or order"; the other reads: "Account David Ferguson or order, care of Merchants Bank." If this bill of lading had been endorsed by Ferguson without recourse, and delivered by the Merchants Bank to A. F. Smith & Co., these words, "care of Merchants Bank" would have been notice enough to put them on inquiry. But the bills of lading were not delivered to A. F. Smith & Co. They remained in the posession of the Merchants Bank and were returned to the Milwaukee Bank. The agency of the Merchants bank was and is of a most limited character. Third parties dealing with such a special agent are bound to take notice of the extent of his authority.

Wilson vs. Nason, 4th Bosworth, 155.
Lyon vs. Kent, 45 Alabama, 664.
Russell vs. Minor, 22d Wend, 659.
Mansfield vs. Inhabitants, &c., 15 Gray, 151.

Parsons vs. Webb, 8th Greenleaf, 38.
Conan vs, Adams, 1st Fairfield, 374-80.
Martin vs. Farnsworth, 50 N. Y., 410.
Holtsinger vs. N. Y. Ex. Bank, 1st Sweeny, 71-3.
Voss vs. Robertson, 46 Alabama, 483.
The City Bank vs. The R. W. & C. R. Co., 44th N. Y., 141.
Butler vs. Maples, 9th Wal., 773.
Wooster vs. Sherwood, 25 N. Y. 287.

2d. But the letters and the orders enclosed in them cannot be so read as to make the delivery of the wheat absolute and unconditional to A. F. Smith & Co. The letters are addressed to "A. F. Smith & Co., proprietors of the Corn Exchange Elevator." This is important language to observe. After the address they proceed to say that "enclosed is our order to deliver the wheat to you, and the wheat IS TO BE HELD BY YOU FOR US until the following draft is paid." The "order" is even more explicit than the letter. It directs the delivery of the cargo into "the Corn Exchange Elevator for the account of D. Ferguson, cashier, subject to the order of the Bank." This is plainly an order to store the wheat in the warehouse. It must be construed to mean that and nothing else. It cannot mean, was not intended to mean the same thing as if it had said: "Deliver your cargo of wheat to A. F. Smith & Co." The agent was obeying, and intended to obey his instructions. He had, and could have had no other motive than to literally and exactly obey his instructions. He used language, plain, distinct, and clear enough to express simply storage of the wheat in the Corn Exchange Elevator for account of D. Ferguson, cashier. It is just the language the cashier would have used had the order been to deliver the wheat into any other warehouse in Oswego for the account of Ferguson.

If then the wheat was in the Corn Exchange Elevator by virtue of the order for storage, and to await further orders, it is clear that it could be moved only on the order of the Mer-

chants bank. A. F. Smith & Co. held the wheat as bailees. Their custody and possession of it was that of warehouse-men.

The law is now well settled, that a vendor may make his vendee a bailee of property sold. Third persons purchasing in good faith, and for a valuable consideration, from such bailees acquire no title as against the vendor. This rule is now firmly established in the State of New York.

The following authorities out of many, are cited to this point:

Coggill vs. H. & N. R. R. Co., 3d Gray, 545.
Couse vs. Tregent, 11th Mich., 65.
Dehon vs. Bigelow, 8th Gray, 159.
Brown vs. Haynes, 52d Maine, 578.
Hotchkiss vs. Hunt, 49 Maine, 213.
Parmlee vs. Catherwood, 36 Missouri, 479.
Ulman vs. Barnard, 7th Gray, 554.
Miller vs. Stevens, 100 Mass., 518.
Hirschen vs. Cunney, 98 Mass., 150.
Herring vs. Hoppock, 15 N. Y., 409.
Palmer vs. Hand, 13 John's, 434.
Cragen vs. Coe, 29th Conn., 52.
Ballard vs. Burgett, 47 Barbour, 646.
" " " 40 N. Y., 314.
Austin vs. Dye, 46 N. Y., 500.
Maynard vs. Andersen, 54 N. Y., 641.
M'Goldrich vs. Willets, 52 N. Y., 318.
Clark vs. Welles, 45 Vt., 4.
Buckmaster vs. Smith, 22d Vt., 203.
Stone vs. Perry, 60th Maine, 50.
Kohler vs. Hayes, 41st Cal., 456.
Kimball vs. Jickman, 42 N. Hamp., 242.
Fick vs. Ewen, 46 N. Hamp., 173.
Holmark vs. Malen, 5 Cold. (Tenn,) 482.
Moakes vs. Nicholson, 115 Eng. Com. Law, 290.
Hunter vs. Warner, 1st Wisconsin, 141.

Second. The case is not within any of the provisions of the so-called factor's act, of the State of New York.

1st. It is not within the first section of the factor's act because the wheat was not shipped by the owner in the name of another.

Colville vs. Hill, 4th Denio, 329.
Dows vs. Perrin, 16th N. Y., 325.
Bonito vs. Mosquera, 2d Bosworth, 452 and 465.
Stevens vs. Wilson, 6th Hill, 512.
" " " 3d Denio, 472.
Colville vs. Hill, 2d Selden, 374.
Warner vs. Martin, 11th How., 209.
Decan vs. Shipper, 35 Penn., 539.
Hardman vs. Booth, 1st Hurl and Colt., 802.

2d. It is not within the 3d section of the act, because

1st. A. F. Smith & Co. were not "factors" or "agents" of the Milwaukee bank.

Heyman vs. Flewker, 106 Eng. Com. Law, 527.
Lamb vs. Attleborough, 101 Eng. Com. Law.
Monk vs. Wittenburg, 22d Eng. Com. Law, 22.
Wood vs. Rowcliff, 6 Hare, 191.
Zachrison vs. Ahman, 2d Sandford, 68.
Wilson vs. Nason, 4th Bosworth, 155.
Elliot vs. Bidwell, 51st N. Y., 644.
Florence Sewing M. Co. vs Warford, 1st Sweeny, 443.
Fuentes vs. Mentes, 3d Law Rep., Com. Pleas, 268.
Fuentes vs. Mentes, 4th Law Rep. Com. Pleas, 93.

2d. Because A. F. Smith & Co. were not "factors" or "agents," entrusted with the wheat "for the purpose of sale," or "as security for any advances to be made or obtained thereon."

3d. Because A. F. Smith & Co. were not at any time entrusted with any one of the documents mentioned in the 3d

section of the law to wit, "a bill of lading," a "custom house permit," or a "warehousekeepers receipt for the delivery of merchandise."

4th. Because the case is directly within the exceptions contained in the sixth section of the act. The wheat, under the orders, could only be held by A. F. Smith & Co., as proprietors of the Corn Exchange Elevator, for the account of David Ferguson, cashier, subject to the order of the Merchants Bank.

Wilson vs. Nason, 4th Bosworth, 155.
Cartwright vs. Wilmerding, 24 N. Y., 527.
Cook vs. Adams, 1st Bosworth, 504.

VI.

It was claimed in the Court below that the defendants were entitled to invoke in their behalf the principle, that "whenever one of two innocent persons must suffer by the acts of a third party, he who has enabled the third person to occasion the loss must sustain it." This argument was based upon the theory that there was an absolute delivery of the wheat to A. F. Smith & Co., by the Merchants Bank, and that Dows & Co. were not bound by what was termed the "secret instructions" to the Merchants Bank, to "hold" the wheat until the drafts were paid; that the wheat being thus delivered into the manual possession of A. F. Smith & Co., they were clothed with the indicia of apparent title by the act of the Milwaukee Bank, and Dows & Co., acting in good faith and without notice, have been deceived and mislead by the conduct and acts of the Milwaukee Bank, and its agent.

The argument was ingenious, but is not sound. The principle invoked, has no application to the facts in this case and for several reasons, some of which I will specify.

1st. It is a general principle of law, that the owner of personal property cannot be divested of his title thereto without his knowledge or consent. The authorities to support this

proposition are for too many to be cited in this brief. I will content myself with citing some of the leading authorities.

Mitchell vs. Hawley, 16th Wallace, 550.
McGoldrick vs. Willits, 52 N. Y., 612.
Wright vs. Ames, 2d Keyes, 221.
Ballard vs. Burgett, 40 N. Y., 314.
Austin vs. Dye, 46 N. Y., 502.
Maynard vs. Anderson, 54 N. Y., 641.
Fawcett vs. Osborn, 32d Ills., 411.
Linen vs. Cruger, 40 Barbour, 636.
Saltus vs. Everett, 20 Wend., 275.
Spaight vs. Hawley, 39 N. Y., 441.
Cook vs. Beale, 1st Bosworth, 497.
Williams vs. Aberle, 11th Wend., 80.
Evans vs. Wells, 22 Wend., 324.
Andrews vs. Dietrich, 14 Wend., 31.
McMahen vs. Jones, 2d Jones, (Pa.) 229.
Bailey vs. Shaw, 4th Foster, (N. H.) 297.
Brown vs. Wilmerding, 5th Duer, 225.
Anderson vs. Nichols, 5th Bosworth, 129.
Wooster vs. Sherwood, 25th N. Y., 286.
Warner vs. Martin, 11th Howard, 209.
Leckey vs. McDermott, 8th Serg. and R., 500.
Stanly vs. Gaylord, 1st Cushing, 228.
Hotchkiss vs. Hunt, 49 Maine, 213.
Roland vs. Gundy, 5 Ohio, 127.
Barker vs. Dinsmore, 72 Penn., 427.
Robinson vs. Haas, 40 Cal., 478.
Kohler vs. Hayes, 41st Cal., 456.
Ryckman vs. Decker, 23d N. J. Equity, 288.

A. F. Smith & Co. were warehousemen. They were "proprietors of the Corn Exchange Elevator." Dows & Co. were advised of this fact, by all the letters written to them by A. F. Smith & Co. They knew they were dealing with parties whose business necessarily placed large quantities of grain in their

possession, simply for storage. This fact was of itself sufficient to put them on inquiry as to the title of any wheat received from A. F. Smith & Co. This point is distinctly brought out in the case of Hull vs. Walker, cited in Taylor vs. Pope, 5th Caldwell (Tenn), 418. See also the cases of Wooster vs. Sherwood, 25th N. Y. 278, Hamilton vs. Bell, 10th Exchequer, 544, and Whitefield vs. Branch, 16th Meeson and Welsby 282.

3d. A. F. Smith & Co., not only had no title but they had not even any indicia or documentary evidence of title to the wheat. They held no paper from the Milwaukee Bank or its agent in relation to the wheat, except the letters of the Merchants Bank. Dows & Co., did nor, therefore, make their advances to A. F. Smith & Co., upon the faith or credit of any written document which showed apparent title in A. F. Smith & Co., and which was placed in the hands of A. F. Smith & Co., by the Milwaukee Bank, or its agent, or by its authority. "The documentary evidence of title" exhibited to Dows & Co. was issued by A. F. Smith & Co., without authority from the Milwaukee Bank or its agent.

It is not pretended that the Milwaukee Bank or its agent made any representation of any kind either verbal or written, upon the faith of which Dows & Co. acted in making their advances to A. F. Smith & Co., Dows & Co. can therefore claim nothing by way of estoppel.

Bragg vs. Boston & W. R. Co., 9th Allen 61.
Zuchtman vs. Roberts, 109 Mass. 53.
McGoldrick vs. Willits, 52d N. Y. 612.

4th. The evidence is clear that Dows & Co. made their advances to A. F. Smith & Co. solely upon the faith and credit of the bills of lading signed by the captains of the canal boats and obtained by A. F. Smith & Co. without the knowledge or consent of the Milwaukee Bank. They trusted to nothing done or said by the Milwaukee Bank or its agent. They relied solely upon acts of A. F. Smith & Co., and not upon acts of the Milwaukee Bank or its agent.

5th. The only act done by the Merchants Bank was to direct the wheat to be stored in the Corn Exchange Elevator for the account of David Ferguson, cashier, subject to its own order. Dows & Co. made no advances to A. F. Smith & Co. upon the faith of that order. That order placed the custody of the wheat in A. F. Smith & Co., as proprietors of the Corn Exchange Elevator, for a special purpose, and not for the purpose of selling, nor for delivering the wheat to them as vendees. They had such possession and only such possession as Matthews had in Wilson vs. Nason, or the woman in Wood vs. Rawcliff, or Tuthill in the case of Cook vs. Adams, or the wharfinger in Monk vs. Whittenburg, or the pretended agent in Barker vs. Dinsmore, or the jeweler in Spraights vs. Hawley, or the oyster dealer in Ryckman vs. Decker, or the cotton merchants and warehousemen in Hull vs. Walker.

Unless mere possession of personal property by a special bailee can be said to be sufficient evidence of an act of one party, calculated of itself to mislead another party, then it is plain that Dows & Co. were not deceived or misled by the act of the Merchants Bank in directing the wheat to be stored in the Corn Exchange Elevator for the account of David Ferguson, cashier.

It is well settled law that mere possession of chattels confers no power of sale. "Chattels are not negotiable."

Spraight vs. Hawley, 39 N. Y., 449.
Ryckman vs. Decker, 23d N. J. Equity, 288.
Taylor vs. Pope, 5th Coldwell, 416.
McNeil vs. Tenth Nat. Bank, 46 N. Y. 329.
McGoldrick vs. Willits, 52 N. Y. 318.
Ballard vs. Burgett, 40 N. Y. 314.

The principle invoked by Dows & Co. is of manifest justice when confined within its proper limits. But the principle, as a rule, has many exceptions, and the difficulty in its application consists in determining what acts or conduct of the party sought to be charged can properly be said to have "enabled

the third person to occasion the loss," within the meaning of the rule. If the owner of a horse leaves it with a stable keeper, he does not, by such act, "enable" the stable keeper to impose upon innocent third parties. The owner of valuable diamonds, by leaving them in the custody of a jeweler for repair or safe keeping, does not "enable" the jeweler to deceive innocent third parties. The owner of wheat, by depositing the same for storage with a warehouseman does not thereby "enable" the warehouseman to impose upon innocent third parties. In each of these cases, the owner has, indeed, left the property in manual possession of the bailee; but he has clothed such bailee with no papers or indicia of ownership which has enabled the bailee to appear to third parties to be the ostensible or apparent owner. By said act, he has done nothing or said nothing to deceive or mislead the purchaser. The purpose for which the property was left, was, itself, a valid one. The owner, under such circumstances, is not estopped from claiming his property from the innocent purchaser. "Estoppel in pais, presupposes an error or a fault, and implies an act in itself invalid."

It is clear that Dows & Co. were not "induced" to make the advances they did upon the bills of lading forwarded by A. F. Smith & Co., by any belief that the Milwaukee Bank or its agent had "enabled" them to make the shipment at the time and manner it was made. A. F. Smith & Co. were not, in any manner, or by any writing exhibited to Dows & Co., constituted agents of the Milwaukee Bank or the Merchants Bank to make the shipment. A. F. Smith & Co. exhibited no paper and had no paper to exhibit to Dows & Co., showing themselves entrusted with the wheat for the purpose of sale, or as owners.

A. F. Smith & Co. were only such bailees as the stable-keeper, jeweler or warehouseman in the cases supposed. The principle that "when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss" is not, therefore, applicable to this case. The "possession" of A. F. Smith & Co. was the same as the

"possession" of any other special bailee of property. Third persons dealt with A. F. Smith & Co. as to this wheat, at their peril. Dows & Co were bound to know the extent and character of the possession. They have no legal right to say the bare depositing the wheat in a warehouse owned by A. F. Smith & Co. was clothing them with apparent title to the wheat. No such legal conclusion followed or can follow from the premises. No purchaser of chattels can be said to be an innocent one, who relies solely and only on the fact of possession in his vendor. He has no right to rely upon mere possession as conclusive evidence of title.

The title of the wheat in question, by this argument, is traced from its inception to its receipt by Dows & Co. By the legal acts of Oliver & Hart, and George I. Jones & Co., the original purchasers and shippers, the legal title was vested in the Wisconsin, Marine and Fire Insurance Company. It has never been divested by its act or the authorized act of its agent.

As the Supreme Court of Pennsylnania, in Barker vs. Dinsmore, 72 Penn., 434, says, "the case is a hard one in any aspect of it. One of two innocent persons must suffer by the fraud and knavery of a swindler who had no authority to act for either. But the law is well settled that the owner cannot be divested of his property without his own consent unless he had placed it in the possession or custody of another, and given him an apparent or implied right to dispose of it". No right "implied" or "apparent" was given to A. F. Smith & Co., by the owners of the wheat, to ship it into the canal boats. The shipment was a fraud upon the owners, and was and is a fraud upon Dows & Co. Both parties being equally innocent the one holding the legal title to the wheat must prevail.

VII.

Dows & Co. were not entitled to deduct from the value of the wheat in their hands, the freight and charges for its transportation from Oswego to New York City.

The reason why they are not is a plain one. The owner consigned his property to Oswego. It was, without his knowledge or consent, sent to New York City and loaded down with charges for transportation. If the property had been tortiously shipped to Liverpool instead of New York, by the same rule that would enable Dows & Co. to collect the freight and charges they claim the owner would be obliged to pay the charges at Liverpool. The maxim that no person can be deprived of his property without his consent applies. It is only necessary to cite the authorities.

Van Buskirk vs. Purington, 2d Hall, 561.
Collman et al vs. Collins, do 569.
Fitch vs. Newbery, 1st Douglass, (Mich.) 1.
Robinson vs. Baker, 5th Cush, 137.
Clark vs. Lowell R. Co., 9th Gray, 232.
Stevens vs. B. & W. R. Co., 8th Gray, 262.
Gilford vs. Smith, 30 Vermont, 74.
The Anne 1st Mason, 512.
Davis vs. Bigler, 62d Penn. 251.

VIII.

The measure of damages was the value of the wheat with interest from the date of its conversion.

Ewing vs. Blount, 20 Ala. 694.
Davison vs. Gunolly, 1st Mich. 388.
Ullman vs. Barnard, 7th Gray, 558.
Clark vs. L. R. Co., 9th Gray, 231.
Romaine vs. Van Allen, 26 N. Y. 309.
Burt vs. Dutcher, 34 N. Y. 496.
Ballard vs. Burgett, 46 Barb. 441
Rush vs. Dows, 28 Barb. 187.
Young vs. Willet, 8th Bosworth, 486.
Groat vs. Gile, 51st N. Y. 431.
Brown vs. Haynes, 52 Maine, 578.

Angier vs. Taunton Paper Co., 1st Gray. 61.
Edmundson vs. Nutting, 17 Conn. Bench, 280.
Swizer vs. Leach, 18 Conn. Bench, 479.
Craine vs. Bailey, 10 Gray, 87.
Adams vs. O'Connor, 100 Mass. 515.
White vs. Webb, 15 Conn. 102.

IX.

This argument disposes of this case. If it is sound and good law then the judgment in this cause is right, and will be affirmed.

The rule of the common law is caveat emptor. Judge PECKHAM, in 52 N. Y. reports, page 619, says that it is "a healthy rule and promotes good morals and common honesty."

That rule will not permit Dows & Co., though they acted in good faith and paid their money in the honest belief that A. F. Smith & Co. owned the wheat covered by the bills of lading sent them, to hold the wheat as against the true owners. Title to property is not lost to the owner by the mere filling up by a wrong-doer of bills of lading, and obtaining the siguature of a captain thereto. Nor will title to the wheat in question pass to Dows & Co., simply because they believed A. F. Smith & Co. owned it unless that belief was induced by some act done, word said, or writing given by the owner, and upon the faith of which they made their advances. In the Bank vs. Kennedy, 17th Wallace, page 8, is this language: "The belief of one party is not the criterion by which the rights of the parties are to be governed, unless the other party by his conduct or declarations induced that belief." Dows & Co. might have believed that A. F. Smith & Co. would send no wheat to them not their own; that belief will not however operate of itself, to transfer the wheat of the Milwaukee Bank to them, unless it or its authorized agent has by some act or declaration induced the belief. The evidence shows too clearly for doubt that Dows & Co. relied solely and entirely upon the bills of lading, signed by the captains of the canal boats and which covered wheat never

owned by A. F. Smith & Co. They made no inquiries as to the title; they trusted implicitly in and relied solely upon the acts and declarations of A. F. Smith & Co. Their only remedy for this heavy loss is against A. F. Smith & Co. They cannot take the wheat of the Milwaukee Bank, to make up the loss they have sustained by the knavery of A. F. Smith & Co. There is no remedy that I know of, against a vessel, or its owner, for one who advances on bills of lading, signed by a captain when the property has not been delivered on board of the vessel. (Dean vs. King, 22d Ohio Stat. 136.) The sole remedy is against the party who signed the bill of lading. I know of no remedy the law gives to a party who advances his money on bills of lading that are forged, except against the forger or pledgor. I know of no remedy the law affords a purchaser of chattels against the true owner of them; his remedy is against his vendor.

The law can punish roguery and crime, but it cannot protect innocent parties against the multitudinous forms and devices which bad and designing men employ to carry out their knavery and rascality.

The most the law can say to a purchaser of chattels, is, caveat emptor.

Dows & Co., and all other parties advancing money on bills of lading are bound to know that they are genuine ; they are bound to know that the grain covered by them is on board the vessel, and they are bound to know that the grain thus on board was put there by the knowledge, order or consent, of the true owner. All this they must certainly know, if they would be certainly safe in advancing money on bills of lading. Ignorance of any these facts is fatal to their rights under a bill of lading, if the real facts are that the bill of lading is a forgery, or that the property was never on board, or that it was shipped without the knowledge or consent of the true owner.

H. M. FINCH,

Of Counsel for Wis. Marine and Fire Ins. Co.

Deft. in Error.

U. S. Supreme Court.

DAVID DOWS, JOHN D. MAIRS and ALEXANDER E. ORR,
Plaintiffs in Error.
versus
THE WISCONSIN MARINE AND FIRE INSURANCE COMPANY,
Defendant in Error.

Brief and Points of Plaintiffs in Error.

I.—(1.) This case comes before this Court on Writ of Error to the Circuit Court of the U. S., for the Southern District of New York.

The action was in trover commenced 6th Nov., 1869, by capias returnable the 20th of that month.

In the declaration it is alleged that the plaintiff, the Wisconsin Marine and Fire Insurance Company, theretofore, to wit, on the 1st day of October, 1869, at the City of New York, was the owner and lawfully possessed, as of its own property, of certain wheat; to wit, of the following parcels, namely:

(1.) Of 7,900 bushels which were laden on the canal boat "Mine Dingman."

(2.) Of 7,800 bushels which were laden on the canal boat "Harm and Post."

(3.) Of 7,660 bushels which were laden on the canal boat "E. D. Case."

(4.) Of 2,825.14 bushels which were laden on the canal boat "Anna Rebecca,"

Being altogether 26,185$\frac{14}{60}$ bushels of wheat, of the value, to wit, of $60,000, which the plaintiff casually lost out of its possession and which came into the possession of defendants by finding, who converted the same to the damage of the plaintiff to $70,000.

Plea.—The general issue.

The cause was tried before the Hon. WM. D. SHIPMAN, sitting as Circuit Judge, and a Jury, who, by the direction of the Judge, on the 19th day of November, 1872, brought in their verdict for the plaintiff for $35,205.$\frac{28}{100}$.

And thereafter a Bill of Exceptions was signed and sealed in the same term of the Circuit Court.

(2.) The defendants were produce commission merchants, doing business in New York under the firm name of David Dows & Co. A. F. Smith & Co. were dealers in grain and commission merchants, at Oswego. This firm was composed of A. F. Smith and Sidney Bickford. A. F. Smith was the leading member of the firm.

Sidney Bickford was called as a witness for the plaintiff; A. F. Smith was not called.

It is a peculiar feature of Oswego as a lake port in which the grain business was and is the largest done there, that the dealers in grain and commission merchants have a warehouse with an elevator on the river, having some distinctive name where they transact their business. Smith & Co. had such a warehouse with an elevator, which was called the Corn Exchange Elevator.

David Mannering, on p. 72.

The business which A. F. Smith & Co. carried on there was that of dealers in grain on their own account and commission merchants, and they advertised themselves as dealers in grain and commission merchants, and proprietors of the Corn Exchange Elevator. They sometimes took in grain on storage for other parties when that was stipulated

for; but the general business transacted at the warehouse was that of dealers in grain, and commission merchants.

Bickford in fol. 64.

The nature of the transactions which defendants had with them was, receiving consignments of grain for sale on consignment. They never had any transactions with them as warehousemen.

Bickford, fol. 65.

In the course of these defendants' dealings with A. F. Smith & Co. as receivers of grain for their account for sale for a commission, the defendants on 7th Oct., 1869, received through the Ninth National Bank of New York a B. L. dated Oct. 4, 1869, for 7,900 bushels wheat, which had been shipped at Oswego on the boat "Mine Dingman" on the day of its date, showing the shipments by A. F. Smith & Co. for their account, to David Dows & Co., with sight draft attached same date, for $5,980, to the order of J. T. Hill, Cashier (who was the Cashier of that bank.) The defendants paid the draft on presentment, on delivery of the bill lading and accompanying certificate of insurance.

Like bills of lading of the boats "Harm and Post" and "E. D. Case," dated Oswego, Oct. 5, 1869, the former with sight draft attached for $8,970, and the latter with sight draft attached for $8,426, were received through banks by defendants, 7th Oct., 1869, who paid the drafts on delivery of the bills lading and accompanying certificate of insurance.

The "Mine Dingman" arrived in New York Oct. 30, 1869, and defendants paid the freight from Oswego to New York, $1,146\frac{67}{100}$. The wheat was sold Nov. 4, 1869, from store.

The "Harm and Post" arrived Nov. 1, 1869, and defendants paid freight and charges.

The "E. D. Case" arrived Nov. 1, 1869, and defendants paid freight and charges.

The testimony to the particulars of the shipment from

Oswego to New York, which was offered in evidence by the defendants for the purpose of showing title in defendants as consignees by reason of advances made on consignments by bill of lading of the wheat shipped by A. F. Smith & Co. to the defendants, in connection with evidence that such advances were made in the usual course of business, and bona fide, and without notice of any claims of the plaintiff or any other person thereto except A. F. Smith and Co., which was excluded by the Court under exception, is set forth in the Bill of Exceptions, fols. 76 to 84.

The defendants, on the 16th October, 1869, received a letter from the Merchants' Bank, Watertown, dated October 15th, 1869, (Ex. N. W. No. 1, A. B. G.) read in evidence on p. 46, advising of an order by A. F. Smith & Co., in favor of N. Winslow (who was the Merchants' Bank) for any margin due them on grain, &c., which is referred to in the answer of David Dows to the formal demand of plaintiff of November 6th, 1869.

1869, October 22d, the defendants received a telegram from Oswego of this date, of which the following is a copy, found on p. 15.

Exhibit No. 2 (G. I. J.)

OSWEGO, 22*d October*, 1869—4 P. M.

DAVID DOWS & Co., New York City:

Seventy-nine hundred (7,900) bushels wheat shipped to you from Oswego, October fourth (4th), eighteen hundred and sixty-nine (1869), on canal boat "Mine Dingman;" and seventy-eight hundred (7,800) bushels wheat shipped to you from Oswego, October fifth (5th), eighteen hundred and sixty-nine (1869), on canal boat "Harm and Post,' and seventy-six hundred and sixty (7,660) bushels wheat shipped you from Oswego, same day, on canal boat "E D. Case," and twenty-eight hundred and twenty-five (2,825) bushels wheat shipped you from Oswego, October eight (8), eighteen hundred and sixty-nine (1869), on canal boat "Anna Rebecca," from schooner "Atmosphere," is the property of the Wisconsin Marine and Fire Insurance

Company of Milwaukee, which will hold you responsible for the same.

D. FERGUSON, *Cashier*,
Wisconsin Marine and Fire Insurance Co.
Of Milwaukee.

$3.56.

On the next morning George I. Jones who had transmitted it, presented himself to David Dows in New York City, when Mr. Dows admitted the receipt of the dispatch, &c. (fo. 24.)

1869, November 6th, a formal demand by note of that date was made on defendants for the wheat claimed on behalf of plaintiff, the Wisconsin Marine and Fire Insurance Company, from the four boat loads, to which the defendants replied: "If you are entitled to the wheat, and will pay the freight and charges and our advances, and take care of the order to Winslow, we will account to you for the proceeds, but we don't know you in the matter."

See page 63.

(3) On the trial, after the plaintiff had put in evidence entries from the grain book and tallies of receipts kept at the Corn Exchange Elevator of A. F. Smith & Co., showing the receipts at the Elevator from the schooner "Thomas Parsons," October 2d, 1869, for account A. F. Smith & Co., of in all 18,734$\frac{27}{60}$ bushels wheat.

And of the receipt of wheat from the schooner "Atmosphere," October 3, 1869, for account A. F. Smith & Co., of 14,850$\frac{47}{60}$ bushels.

And of deliveries from cargo of schooner "Thomas Parsons" for account A. F. Smith & Co., Oct. 4, into canal boat "Mine Dingman," 7,900 bushels, and into the boat "Harm and Post" 3,434$\frac{27}{60}$ bushels; and of deliveries from schooner "Atmosphere for account A. F. Smith & Co., Oct. 4, into boat "Harm and Post" 4,355$\frac{33}{60}$; October 5, canal boat "E. D. Case, 7,660 bushels; the defendants' counsel offered to admit it as sufficiently proved that 7,900 bushels of wheat shipped by A. F. Smith & Co., in the canal boat

"Mine Dingman" under canal bill of lading of date of October 4, 1869, was part and parcel of the wheat ex schooner "Thomas Parsons"; and the 3,434$\frac{27}{60}$ bushels of 7,800 bushels shipped by A. F. S. & Co., under canal bill of lading of date October 5, 1869, in the boat "Harm and Post" was part and parcel of the wheat ex schooner Thomas Parsons.

That 4,365$\frac{22}{60}$ bushels of the 7,800 shipped in the boat "Harm and Post" was part and parcel of the wheat ex schooner "Atmosphere;" and that 7,660 bushels wheat shipped in the canal boat "E. D. Case" by A. F. Smith & Co., under canal bill lading of date Oct 5, 1869, came from the cargo of the schooner "Atmosphere;" and that all of said wheat by said three canal boats, after the receipt thereof by defendants in New York by said canal boats under canal bills lading consigning the same to defendants, was sold by them at the rate of $1.28 a bushel. But that against said boats they had paid certain charges set forth in the bill of exceptions, which reduced the net to a sum much less than the gross receipts, as might appear from that figure.

The plaintiff's counsel accepted the foregoing admission as to identity of the wheat from schooner "Thomas Parsons" and "Atmosphere" respectively, and of rate of sale by defendants; and withdrew all claims in respect to the wheat 2,825$\frac{14}{60}$ theretofore claimed in this suit, on the boat "Anna Rebecca," which was thrown out of the case.

(4.) The wheat had been purchased at Milwaukee and shipped these on board these schooners for delivery at Oswego by commission merchants at Milwaukee, under orders of A. F. Smith & Co., of Oswego, by letter and telegram, for the purchase and shipment of the wheat for account of said A. F. Smith & Co., for their immediate use in their local trade, to be paid for by acceptance of draft, part sight, equivalent to cash for margin, as it is expressed in the order, balance on time through the Merchants' Bank at

Watertown, as their local trade required time to turn the wheat to meet the payments of the time drafts.

On the shipment of the wheat on each schooner, invoices were transmitted to A. F. Smith & Co., by the purchasing commission merchants, by mail, showing the purchase and shipment for account A. F. Smith & Co., Oswego; charging A. F. Smith & Co., for the cost of the wheat and for storage, inspection, insurance until shipped; marine insurance to Oswego, interest until shipped, interest on sight and time drafts, stamps, interest on sight and time drafts and commissions, and closing the account by a credit of the drafts.

See the invoice of cargo, schooner "Thos. Parsons," pp. 26, 27.

Invoice of cargo, schooner "Atmosphere," p. 19.

On receipt of the invoices in the letters enclosing them, which disclosed no terms of payment, except as provided in the orders, that is to say, by the acceptance and payment of the sight, and acceptance of the time drafts, A. F. Smith & Co., paid the sight drafts, and accepted the time on presentment through the Watertown Bank.

After the sight drafts drawn "for a margin" had been paid and the time had been accepted, whereby the obligation of A. F. Smith & Co., for the purchase was secured, the wheat on arrival of the schooner at Oswego, was delivered to A. F. Smith & Co., at the Corn Exchange elevator, on orders to the captains of the schooners from the Merchant's Bank, at Watertown, to which, as the bank of A. F. Smith & Co., on their request, the bill of lading consigning the wheat to it, under endorsement by the plaintiff, "without recourse," had been forwarded with the drafts.

On such delivery the wheat was received by A. F. Smith & Co., for their account as the owner, as it was contemplated by the terms of the sale, and the circumstances of the transmission and delivery they should do, and on such delivery they were in rightful possession of the wheat, as the purchasers, with an authorized, ostensible and real ownership,

holding the same for their own account and risk as the owners, subject to their obligation to pay the time drafts, from which no accident or contingent risk to the wheat could relieve them.

(5.) Oliver and Hart were the commission produce buyers at Milwaukee, who purchased the wheat per schooner "Thomas Parsons;" and George I. Jones & Co., the commission merchants there, who purchased the wheat shipped by the schooner "Atmosphere," and the plaintiff was the bank at Milwaukee, with which these commission merchants did their business.

The Merchants' Bank at Watertown, of which Norris Winslow was the proprietor, was a bank with which A. F. Smith & Co., before their removal from Cape Vincent to Oswego, and after their removal to Oswego, kept their account; and their account was among the largest kept at that bank, and down to their failure, 15th October, 1869, their credit was good with that bank.

Moffitt, on p. 39.

Norris Winslow swears as to the credit and standing of A. F. Smith & Co., prior to and down to their failure on the 15th Oct., 1869, that they enjoyed an enviable reputation and very high credit.

Upon the undisputed evidence the transaction of the purchase, in each case, as between the commission merchant at Milwaukee and A. F. Smith & Co., from its inception down to the payment of the sight and acceptance of the time draft, after receipt of the invoice, was simply the case of a sale for the immediate needs of A. F. Smith & Co., in their local trade, for part sight equivalent to cash and balance on credit stipulated for, for the reason assigned, that time was required by their local trade.

I collect the correspondence by letter and telegram in relation to the purchase of the wheat between the commission merchants and A. F. Smith & Co.; and first this cor-

respondence between Oliver & Hart and A. F. Smith & Co., in relation to the purchase of the wheat shipped by the schooner "Thomas Parsons."

1. Letter of A. F. S. & Co., to O. & H. (Ex. No. 4., on p. 24; Ex. T. P., No. 1 of Bickford, on p. 54.)

OSWEGO, N. Y., *September 15th*, 1869.

Messrs. OLIVER & HART, Milwaukee:

Gentlemen:—We want a cargo or two of wheat for our local trade, and, though prices may be lower when the movement of the crop becomes more active, still, any decline is likely to be counteracted, partially at least, by advance in freights. We, therefore, think it may be as well to supply our immediate needs at once. If you can draw, say st. for margin, balance 30 and 45 days, through Merchants' Bank, Watertown, N. Y., you may buy and ship, on receipt, a cargo choice 1 wheat. You understand, that our home trade requires a little time, and we desire drafts sent through Watertown, as we keep an ac. there, and a large portion of our trade being in that section, very many of our collections are made there. It is, therefore, more convenient for ourselves and customers. Please advise by mail what you can do, and oblige. We are at all times ready to pay st. on any consignments you may favor us with.

Yours truly,

A. F. SMITH & CO.

2. Telegram A. F. S. & Co., to O. & H. (on page 24). Dated Oswego, N. Y., 16, Received at Milwaukee, Sep. 16.

To OLIVER & HART:

Buy cargo choice No. Two (2). Draw twenty (20) cents sight; balance 20 days. Merchants' Bank, Watertown. This instead of order by letter.

A. F. SMITH & CO.

3. Telegram O. & H. to A. F. S. & Co. (Ex. No. 5, on p. 25.)

MIL., *Sept. 18th*, 1869.

A. F. SMITH &. Co., Oswego, N. Y:

Can place one cargo third, sight, thirty days, No. one (1) prime, twenty-four half (24½). Will commence buying.

OLIVER & HART.

4. Telegram, O. & H., to A. F. S. & Co., (T. P., No. 4, on p. 54).

MILWAUKEE, *Sept. 18th*, 1869.

To A. F. SMITH & Co.:

Not enough to-day to attempt to fill; strong 5½; orders here for No. 1; No. 2, 18½.

OLIVER & HART.

5. Telegram, O. & H., to A. F. S. & Co., (Ex. No. 6, of Oliver, p. 25).

MILWAUKEE, *Sept. 20th*, 1869.

A. F. SMITH & Co., Oswego, N. Y.:

Bought fifteen thousand (15,000), eighteen half (18½) after vessel. Draw as you desired. Shall we draw twenty (20) margins on you, or bank.

OLIVER & HART.

6. Telegram A. F. S. & Co., to O. & H., (Ex. No. 2, of Oliver & Hart).

Dated, Oswego, 20, 1869.—Rec'd at Milwaukee, Sept. 20.

To OLIVER & HART.:

Draw all on Bank as directed.

A. F. SMITH & CO.

7. Letter of O. & H., to A. F. S. & Co., (Ex. No. 9, of Oliver, p. 25).

MILWAUKEE, *Sept. 20th*, 1869.

Messrs. A. F. SMITH & Co.:

Gentlemen,—Your favor, 15th inst., at hand on Saturday, and your several t'ms all understood. We tel'd you purchase of 15,000 No. 2, at 1.18½, and made inquiry whether to draw on you, for sight margins, or Bank, as your tel'm and letter did not expressly state. We have your reply, and will draw as you direct. There were one or two cargoes bought this morning, and the market was very firm and quite active at 1.18½ and ⅝; but at the close of morning board, Liverpool came in 1d. lower, and our market eased off to 1.17, closing strong, with some demand for shipment. We are now after vessel, trying to charter at 12c., and shall advise you by wires of what we do. We think wheat will now pay well to ship.

Y'r f'ds,

OLIVER & HART.

8. Telegram O. & H. to A. F. S. & Co. (Ex. No. 7, of Oliver, p. 26.)

MILWAUKEE, *Sept.* 21*st*, 1869.

A. F. SMITH & Co., Oswego, N. Y.

Chartered "Lillie Parsons," twelve (12). Bought thirty-seven hundred (3,700), sixteen quarter ($16\frac{1}{4}$).

OLIVER & HART.

9. Letter O. & H. to A. F. S. & Co. (Ex. No. 10, of Oliver, p. 26.)

MILWAUKEE, *Sept.* 21, 1869.

Messrs. A. F. SMITH & Co.

Gent'n: We have none of your est'd favors to answer. We chartered the "Thos. Parsons" at 12c. and bought 3,700 more No. 2 *a* $1.16\frac{1}{4}$, to fill up. There was a good demand early in the morning for shipment; but soon after Liverpool reported 3d lower, and this caused almost a panic, and sold down to $1.15\frac{1}{2}$. We hope to get the "Parsons" out to-night. We *wired* you the name of the vessel as "Lillie Parsons;" should have been "Thomas Parsons." Wheat looks cheap to us.

Y'r f'ds,

OLIVER & HART.

10. Letter of O. & H. to A. F. S. & Co. (Ex. No. 11, of Oliver, p. 26.)

MILWAUKEE, *Sept.* 22*d*, 1869.

Messrs. A. F. SMITH & Co., Oswego.

Gentlemen: We have this day sighted on you, thro' Merchants' Bank, Watertown, $3,750, and our 20 dd., $19,462.74, of which draft we have advised the Bank by this mail. We have to quote market dull *a* $1.15\frac{1}{4}$ to $\frac{1}{2}$ No. 2, & 1.21 No. 1, in demand, and scarce. We fear large amounts of wheat, that would have made No. 1, have been damaged by wet, and the present difference.

Yours very truly,

OLIVER & HART.

The invoice of cargo schooner "Thomas Parsons" (Ex. 8 on pp. 26–27), above referred to, was sent with the foregoing letter of Sept. 22, 1869, to A. F. Smith & Co.

11. Letter of A. F. S. & Co. to O. & H. (Ex. No. 3, of Oliver, p. 24; Ex. T. P. No. 11 of Bickford, p. 54.)

OSWEGO, N. Y., *Sept.* 25, 1869.

Messrs. OLIVER & HART,
Milwaukee, Wis.

Gents: Yours of the 21st and 22d both here, and noted. The drafts not here yet, but will be honored on presentation, &c. We don't understand why you drew at twenty (20) instead of thirty (30) days, as we requested. We can send any quantity at 30 days. Some of your neighbors draw 30 and 45 days, and none less than 30. However, it will make no particular difference in this instance. We are taking considerable for other parties, and money is very close here. You and they believe in wheat for shipment, but thus far it looks dangerous after purchase. Each time keep us posted. Should we require, can't you draw say 20c. sight, and 30 and 45 for a cargo or less.

Yours truly,
A. F. S. & Co.

On the presentation of the sight and time drafts drawn for the purchase of this cargo through the Merchants' Bank at Watertown, the sight draft was paid and the time draft accepted by A. F. Smith & Co., as A. F. S. & Co. promised they should be in their foregoing letter, dated Sept. 25. 1869, acknowledging the receipt of letters of O. & H. of Sept 21st and 22d, the latter of which advised of the drafts and enclosed the invoice of cargo of the "Thomas Parsons."

The payment of the sight and acceptance of the time draft, closed the transactions of the purchase so far as performance by A. F. Smith & Co. was concerned, according to the requirement of the terms of the orders for the purchase and invoices.

I now collect the correspondence between George I. Jones & Co. and A. F. Smith & Co. in respect to the purchase of the wheat shipped by the schooner "Atmosphere," which is of the same tenor as that between Oliver & Hart and A. F. Smith & Co., in respect to purchase of the wheat shipped by the schooner "Thomas Parsons."

1. Letter of A. F. S. & Co. to G. I. J. & Co. (Ex. No. 10 of G. I. J., p. 16.)

OSWEGO, N. Y., *Sept.* 15, 1869.

Messrs. GEO. I. JONES & Co.,
Milwaukee, Wis.:

Gentlemen.—We shall want some more wheat for our local trade, and, though prices may be lower when receipts increase, still any decline is likely to be counterbalanced, in a measure at least, by advance in freights; and, as we need the wheat, we think it may be as well to buy it now, *if you can draw as before, say st. for margin, balance* 30 & 45 *days, through Merchants' Bank, Watertown, you may buy and ship us cargo choice* 1 *wheat, on receipt.* Our local trade requires a little time, as we have before explained to you, but for anything else we are always prepared to pay sight. We shall hope to hear from you when the crop movement becomes more general, in the way of consignment. Please advise by telegraph what you do, and oblige,

Yours truly,

A. F. SMITH & CO.

2. Telegram A. F. S. & Co. to G. I. J. & Co. (Ex. No. 7 of G. I. J. & Co., p. 17.

Dated at East Oswego, 16th, 1869.
Received at Mil., Sept. 16.
To GEO. I. JONES & Co.

Buy us cargo No. one (1), and cargo No. two (2), choice Milwaukee wheat. Draw as before, Merchants' Bank.

Answer. A. F. SMITH & CO.

3. Telegram from Geo. I. Jones & Co. to A. F. S. & Co. (Bickford, G. S. & A. No. 3, p. 56.

Dated, Milwaukee, Sept. 16, 1869.
Received at Oswego, 12 M.
To A. F. SMITH & Co.

Our Bank declines taking any paper longer than thirty (30) days, so early in the season.

Answer.
(Signed,) GEO. I. JONES & CO.

4. Telegram A. F. S. & Co. to G. I. J. & Co. (Ex. 8, G. I. J., p. 17.)

Dated Oswego, 16, 1869.
Received at Mil. 1:45 P. M.
To GEO. I. JONES & Co.

You may ship cargo No. 1 (1.) Load schooner "Gerritt Smith" if not already chartered.

A. F. SMITH & CO.

5. Letter Geo. I. Jones & Co. to A. F. S. & Co. (Bickford G. S. & A., No. 5 on p. 56.)

OFFICE OF GEO. I. JONES & CO.,
Commission Merchants.

GEO. I. JONES,
CHAS. P. JONES,

MILWAUKEE, 16*th September*, 1869.

Messrs. A. F. SMITH & Co., Oswego.

Dear Sirs: We received, this morning, your telegram, reading as follows: "Buy us cargo No. One and cargo No. Two choice Milwaukee wheat. Draw as before, Merchants' Bank. Answer." We promptly replied by the wires, saying: "Our bank declines taking any paper longer than thirty days, so early in the season. Answer." And at 2 P. M. received your reply, reading: "You may ship cargo No. One. Load schooner 'Gerritt Smith,' if not already chartered." This latter order shall have our prompt and careful attention. We have already secured the "Gerritt Smith" at 12 cents freight, to load to-morrow or next day, and will commence buying the wheat this afternoon. It is now past 'Change time, and there won't be any market until 3 to 3½ o'clock, when dealers begin to congregate on the sidewalk. Our bankers are unwilling to take any 45 day paper, just now, preferring shorter dates, so that they can turn their money several times before the close of navigation. We are now getting pretty free receipts of wheat; yesterday 62,000 bushels, and to-day 53,000. We are expecting 100,000 per day, before another week, if the weather should continue as favorable as it is to-day. Yesterday and the day before it was wet, and threshing was delayed; but we hear that farmers turned their attention to teaming to market. The new crop has been unusually slow in moving, and the business, so far as New York is concerned this fall, must necessarily be compressed into six weeks; and as far as Oswego is concerned, into about eight; and will have to be sharp and lively to amount to much. We feel very confident that we have secured a good crop, and of excellent quality, and that millers and dealers wanting good Spring wheat will have to rely on our market. This latter is what our visitors who have passed through Chicago tell us. We have sent you by express average samples of our No. 1 and 2 wheat. They weigh 60½ and 57½ lbs. per bushel. Cargoes will be as good, and some will be better colored, as the season advances. Our millers report very favorably on the lots they have ground. We should be glad to have

your views of the trade this fall, and we will endeavor to reciprocate by giving information of our market.

Yours respectfully,

GEO. I. JONES & CO.

6. Telegram A. F. S. & Co. to Geo. I. Jones & Co. (Ex. G. I. J. No. 9, p 18.)

Exhibit No. 9. (G. I. J.)

Dated, East Oswego, 21, 1869.

Received at Milw. Sept. 21.

To GEO. I. JONES & Co.

You may buy and ship us cargo prime two (2) wheat. Draw as before, Merchants' Bank.

A. F. SMITH & CO.

7. Letter of G. I. J. & Co. to A. F. Smith & Co. (Bickford G. S. & A. No. 14, on pp. 57, 58.)

Office of GEO. I. JONES & Co.,

GEO. I. JONES, } *Commission Merchants,*
CHAS. P. JONES. } Chamber of Commerce Building.

MILWAUKEE, 22 Sept., 1869.

Messrs. A. F. SMITH & Co., Oswego.

Dear Sirs:—We received, yesterday afternoon, your telegram, "You may buy and ship us cargo prime two wheat. Draw, as before, Merchants' Bank." There were large orders here in the afternoon, from Chicago, based upon a reported advance in Liverpool, and prices advanced about 2c. per bushel over closing figures on change. No. 2 sold freely at 117 *a* 118, seller September, to the extent of nearly 100,000 bushels. It was very difficult to find any sellers of regular, and we only could pick up 3,000 bushels, which we bought *a* 117. This morning the market opened *a* 117½, but soon fell to 116½ *a* 117, when we filled remainder of your order, and telegraphed, "Have bought 3,000 No. 2 wheat, *a* 116½; 8,000, *a* 116¾ 4,000, *a* 117. Have chartered schooner "Atmosphere," *a* 12c. freight. Expect to ship to-day." All of which, we trust, is satisfactory. At noon, the market was lower, closing *a* 121 for No. 1, and 115 for No. 2, regular, the break in Erie Canal having a depressing effect, notwithstanding firmer prices in New York. We expect to load this afternoon, and, as the wind is favorable, the cargo will probably get through in quick time.

Yours respectfully,

(Signed) GEO. I. JONES & CO.

8. Letter of G. I. J. & Co., to A. F. S. & Co., (Ex. 17, G. I. J., p.p. 19 and 20.)

September 23, 1869.

Messrs. A. F. SMITH & Co., Oswego.

DEAR SIRS:—The schooner "Atmosphere" completed her loading this morning, and we now beg to hand you invoice of her cargo; 14,867 bushels No. 2 Milwaukee Spring Wheat, amounting to $18,222.15, against which we have drawn $3,750 at sight, and $14,472.15 at 30 days, at Merchants' Bank of Watertown, attaching to latter the B. Lading and other documents, all of which we trust will be found correct and satisfactory.

The receipts of wheat were 92,000 bushels, and our market was pretty steady at the close, at 1.16 for No. 2 and 1.20½ for No. 1; our receipts were 6,000 greater than those in Chicago, and notwithstanding our vastly superior quality, our prices were ½ less; our bankers tell us that we can always get in the fall as much time paper payable in Oswego as they care to take, and suggest our saying to you that should you wish ready negotiation it would be well to authorize future drafts on Oswego instead of Watertown.

Yours respectfully,

GEO. I. JONES & CO.

The invoice which is referred to as handed in this letter of September, advising of the drafts, is found in p. 19, Ex. No. 16, G. I. J.)

9. Letter of A. F. S. & Co. to G. I. J. & Co. (Ex. No. 12., G. I. J., on page 18.)

OFFICE OF A. F. SMITH & CO.,

Proprietors of the Corn Exchange Elevator, Commission Merchants for the Sale of all kinds of State, Western and Canada Grain.

OSWEGO, N. Y., *Sept* 25, 1869.

Messrs. GEO. I. JONES & Co., Milwaukee.

Gents.:—Yours of the 23d, with invoice at hand, which seems correct, will examine, and if any errors or omissions should be found, we will report. Our object in getting draft from the West, time, payable at Watertown, is, that we have always trade for local in that direction, and keep our account at Merchants' Bank, Watertown, and make all our collections through them, and always have funds there. We cannot see what, if any, difference it could possibly make to your Bank, whether they draw time on us there or

here, and does make some difference to us. I think there will be no difficulty in getting it done in the way that most conveniences and accommodates us.

Yours truly,
A. F. S. & CO.

P.S.—Drafts not here will be protected on presentation.

The sight draft in the case of the "Atmosphere" was presented by the Second National Bank of Oswego, and the time draft by the Merchants' Bank on the 25th Sept., and the sight was paid, and the time accepted as promised in the above letter of Sept. 25th, acknowledging the receipt of letter of G. I J. & Co., of Sept. 23d, enclosing invoice and advising of the drafts.

10. Letter of A. F. S. & Co. to Geo. I. Jones & Co. (Ex. No. 13, G. I. J., on p. 18) closes the correspondence as to cargo of schooner "Atmosphere."

Exhibit No. 13 (G. I. J.)

OFFICE OF A. F. SMITH & CO.,

Proprietors of the Corn Exchange Elevator, Commission Merchants for the Sale of all kinds of State, Western and Canada Grain.

OSWEGO, N. Y., *Sept.* 25, 1869.

Messrs. GEO. I. JONES & Co., Milwaukee, Wis.

Gents:—Your several letters and telegrams are here, and noted, also your drafts in and honored. Our Mr. B is away attending upon a sick father, which leaves short handed for few days, you will, therefore, please excuse if we don't promptly answer all letters. What will be the future of wheat is what our customers want to know; we have agreed to find out if we could; please give us the desired information.

Yours truly,
A. F. S. & CO.

The payment of the sight-draft and acceptance of the time by A. F. Smith & Co., closed the transaction of the purchase of cargo of the schooner "Atmosphere," so far as performance by A. F. S. & Co. was concerned, according to the requirement of the terms of the orders for the purchase and invoices.

(6.) For the wheat shipped on the "Thomas Parsons" on the 21st September, 1869 (Thomas E. Jones, R. S. Beach,) Oliver & Hart took a bill of lading from the captain, W. C. Harry, which is found on p. 5 of the printed case, dated Milwaukee, Sep. 22, 1869, showing shipment by them addressed ac., and order, D. Ferguson, cashier, Oswego, N. Y., to be delivered as there addressed, or to his or their assigns, upon the payment of the freight and charges as therein stated, with a clause whereby the vessel agreed to deliver the full quantity therein named, or pay for any part not delivered at the current market price, the value thereof to be deducted from the freight money, the shippers thereby assigning to the vessel all rights they might have against the elevator for incorrect or wrong weighing.

Which bill of lading, before it was transmitted to the Merchants' Bank, of Watertown, was endorsed, "Without recourse, D. Ferguson, Cashier."

Oliver & Hart presented the drafts drawn for the purchase of this wheat on A. F. Smith & Co. on the 22d September, 1869, the day of the date, and at the same time presented this bill of lading to Mr. Ferguson and, as this gentleman swears (on p. 5), "the bank discounted the above drafts, and placed the proceeds thereof to the credit of Oliver & Hart. That discount was allowed on the faith of the bill of lading with the drafts."

On this presentation of the drafts for discount with the bill of lading for the shipment by the "Thomas Parsons," Oliver & Hart exhibited to Ferguson the letter of A. F. Smith & Co., dated Sep. 15, 1869, and their telegram, dated Sep. 16, by which the order in this letter was modified (Ex. No. 4, O. & H.) and Ex. No. 1, O. & H., on p. 24, whereby Ferguson, at the time of discounting the drafts, was apprised that the wheat was bought for account of A. F. Smith & Co., for the immediate needs of this latter firm in their local trade, on terms part sight, with a stipulation

for credit as to balance required by their home trade, and of the reason for drawing through the Merchants' Bank.

Oliver swears to the exhibition of this letter and telegram to Ferguson, ex. No. 4, O. & H., and ex. No. 1, O. & H., (on pp. 27, 28.)

The following are copies of the drafts for the purchase of the wheat, drawn in conformity to the directions of this letter of Sept. 15, as modified by the telegram:

(The sight on p. 55 of the record).

$3,750 MILWAUKEE, *Sept.* 22, '69.

Pay to the order of D. Ferguson, Cashier, thirty-seven hundred and fifty dollars, and charge to account of

OLIVER & HART.

To Messrs. A. F. Smith & Co., Oswego, N. Y.,
at Merchants' Bank, Watertown, N. Y.

(*Endorsed*).

Pay to Merchants' Bank, Watertown, N. Y., or order.

(Signed) D. FERGUSON, Cash.

{Two Cent Internal Revenue Stamp Cancelled.}

(The time on p. 7 of the record.)

Exhibit No. 4.

$19,462$\frac{74}{100}$ MILWAUKEE, *Sept.* 22*d*, 1869.

Twenty days after date, pay to the order of D. Ferguson, Cashier, nineteen thousand four hundred and sixty-two $\frac{74}{100}$ dollars, and charge to the account of

OLIVER & HART.

To Messrs. A. F. Smith & Co., Oswego, N. Y.,
Merchants' Bank, Watertown, N. Y.

(*Endorsed on back.*)

{$9.75 stamps cancelled.}

Pay Merchants' Bank, Watertown, New York, or order

D. FERGUSON, Cashier.

The bill lading endorsed "without recourse," by Ferguson, and the drafts were forwarded to the Merchants' Bank of Watertown, by mail, by Ferguson, in a letter dated 22d Sept., 1869, (found on p. 6,) as follows:

Exhibit No. 2.

D. FERGUSON, *Cashier.* ALEX. MITCHELL, *Prest.*
JOHN JOHNSON, *Asst. Cashier.*

WISCONSIN MARINE AND FIRE INSURANCE CO., BANK.
MILWAUKEE, 22*d Sept.*, 1869.

MERCHANTS' BANK, Watertown, N. Y.

Dear Sir:—I enclose for collection and remittance to Metropolitan National Bank, New York, for our credit,

A. F. Smith & Co $3,750 00
do. do. 15 Oct 19,462 74

With B. L &c. 18,754[50] bushels No. 2 Wheat, per schooner "Thomas Parsons," to be held by you for our account till payment of the drafts. Yours truly,

D. FERGUSON, *Cashier.*

This letter was read in evidence by the plaintiff, under objection of defendants, as a private instruction from the Milwaukee Bank to the Merchants' Bank, not admissible to affect the authority of the Merchants' Bank in respect to the delivery as to third parties or as to the defendants, and exception thereto (on p. 6, at fo. 13).

The receipt of this letter, with enclosures, was acknowledged by J. F. Moffit, Cashier of the Merchants' Bank, by letter dated Watertown, N. Y., Sept. 27, 1869, in which he says the enclosures, as stated, have attention. (Ex. 3, on p. 6.)

Besides B. L. and drafts there were other enclosures, a certificate of insurance on the cargo of the "Thomas Parsons," dated Sept. 22, 1869, certifying that Oliver & Hart were insured under and subject to the conditions of policy referred to therein, on wheat inboard cargo of schooner "Thomas Parsons," at and from Milwaukee to Oswego, loss, if any, payable to the assured or order thereon and

return of that certificate. Endorsed in blank, Oliver & Hart.

(Read in evidence on p. 9.)

The case of the plaintiff goes upon the instruction in the letter, Ex. No. 2, on p. 6, with B. L. &c., * * to be held by you for our account till payment of the draft, as an isolated fact, separated from the consideration of the effect of the endorsement, "without recourse," and of the relations of the Watertown Bank, as Smith & Co.'s Bank, and the objects in view in the purchase and the shipment of the wheat for delivery through the Merchants' Bank, and in exclusion of the obvious intent of the transmission of the bill lading with the endorsement, "without recourse," with this instruction to place the wheat at the disposal of the Watertown Bank, as Smith & Co.'s Bank, for delivery, upon its responsibility, to A. F. S. & Co., in furtherance of the objects, and in compliance with the terms of the purchase for their immediate use; without which delivery the plaintiff with these terms before it, when it discounted the drafts on the faith of the bill of lading *with the drafts* could not have supposed the sight draft would have been paid or the time accepted.

The plaintiff was allowed to read in evidence a passage from the deposition of Ferguson, to show what was intended by him by this endorsement on the bill lading which is in order here.

The following is the passage referred to (on p. 10):

Q. At the time the bank which you represent took the drafts in question, had you any reason to suppose that the grain referred to would go into the elevator of A. F. Smith & Co., at Oswego?

A. I had no reason to suppose so; I did not know at the time they had an elevator.

Q. Did you understand that the Bank at Watertown had undertaken to take care of the grain in question for the plaintiff?

A. I did understand so.

Q. Was it for this reason that you endorsed bill lading of the schooner "Thomas Parsons" "without recourse?"

A. I endorsed the bill of lading without recourse, as I did not wish to be liable for any *shortage or any other claim that might come against us.*

I have referred above to the provision in the bill of lading for the payment of the freight on delivery at Oswego, to the clause relating to shortage and to the insurance terminating on arrival at Oswego.

Winslow swears that none of the banks at Milwaukee, consigning cargoes of wheat by bill lading with drafts drawn on A. F. Smith & Co., made any arrangement with his bank or with him for the payment of the freight; nor did they put him in funds for the payment of freight on the cargoes on arrival at Oswego, or for payment of insurance after the cargoes were discharged, and it was not the course of his bank or of other banks, so far as he knew, to make advances for freight on cargoes consigned to them (on p. 45 in fo. 56.)

From this evidence of Ferguson, and his view of the construction and limitation of the purport of the endorsement "without recourse" upon the bill lading of this wheat, in respect to which claims for shortage were to be settled, freight paid, and on which the insurance ended on arrival at Oswego, and in respect to which no provision was made for payment of freight or for further insurance, it is evident that it was the intention in the transmission of the bill lading to the bank at Watertown, that such disposition of the wheat should be made on its arrival at Oswego as would save the plaintiff from liability for shortage or any other claim for freight or contingent risk or any other.

And inasmuch as the delivery of the wheat to A. F. Smith & Co. as the owner, on the arrival at Oswego to settle the shortage, pay the freight and assume the contingent risks of ownership on the termination of the Insurance, is the only disposition which can be supposed to have been in

the view of the parties on the transmission of the bill of lading so endorsed, if not the only conceivable disposition of it by which the plaintiff could be saved from any liability for shortage or any other claim that might come against it in respect of the wheat, the inference is necessary that it was the intention in the transmission that the wheat should on arrival go into the possession of A. F. S. & Co. as the owner, as the party who by reason of his being the owner could settle the shortage, and whose payment of the freight and assuming the risk of ownership would relieve the plaintiff from these claims.

In view of the disposition to be made of the wheat on arrival at Oswego, so as to save the plaintiff from any claim that might come against it, even upon the construction and limited view of Ferguson of the effect of the endorsement, if that is to be accepted, the fullest requirement of obligation of the Merchants' Bank from the instruction, if authorized, or if it had any other object than to secure the responsibility of the Watertown Bank in disposing of the property at its own risk, without recourse to the plaintiff, would be satisfied by a delivery to A. F. Smith & Co. as the owner, under some notice or arrangement whereby to retain a hold on the wheat as security for its appropriation or the appropriation of its proceeds to the payment of the time drafts.

The wheat which had been shipped by the "Thomas Parsons" under bill lading, for account D. Ferguson, Cashier, subject to the order of the Merchants' Bank or its Cashier on the arrival of that vessel at Oswego, on the 2d of October, 1869, was delivered to A. F. Smith & Co., at their elevator, under an order by J. F. Moffitt, Cashier, of the Merchants' Bank, which had been previously transmitted to Oswego by the Merchants' Bank to A. F. Smith & Co., for delivery to the Captain, of which the following is a copy (on p. 33, referred to on p. 36.)

NORRIS WINSLOW, *Banker.* J. F. MOFFIT, *Cashier.*

MERCHANTS' BANK,

WATERTOWN, N. Y., *Sept. 27th*, 1869.

W. C. HARRY, Esq.,
Master Schooner "Thos. Parsons,"
Oswego, N. Y.

Dear Sir: "Deliver your cargo of 18,754 $\frac{50}{60}$ Bush. No. 2 Milwaukee Spring Wheat to the Corn Exchange Elevator, Oswego, N. Y., for ac. of D. Ferguson, Esq., Cash., subject to my order." Yours resp'y,

J. F. MOFFIT, *Cash.*

And Smith & Co., on the said 2d day of October, 1869, having paid the sight draft and accepted the time draft in fulfilment of the terms of the purchase and invoice, on that day settled for the shortage, and paid the freight and received the wheat into the elevator for their own account, as the owners, as shown by the entries in the grain books of A. F. Smith & Co, put in evidence by the plaintiff (on p. 49,) and as it was contemplated by the circumstances of the sale and transmission by the plaintiff that they should do.

The order to the Captain of the "Thomas Parsons" was transmitted to Oswego, in a letter addressed to A. F. Smith & Co., proprietors of Corn Exchange Elevator, of which the following is a copy (on p. 44.)

Exhibit J. F. M., No. 5, A. B. G.

Sept. 27th, '69.

A. F. SMITH & Co.,
Proprietors Corn Exchange Elevator, Oswego, N. Y.

Dr. Sirs:—I enclose an order to deliver to you 18,754 $\frac{50}{60}$ bush. No. 2, Mil. Spring Wheat, consigned to us by the Wis. Marine and Fire Ins. Co. Bank, Milwaukee, and which is to be held by you for us, until the following drafts are paid:

Oliver & Hart on A. F. Smith & Co., st., . . . $3,750
" " do Oct. 15, ... 19,462.78

Yours, resp'y, J. F. MOFFIT, *Cashr.*

This letter appears to have been written in compliance with the view of the Merchants' Bank of the requirement of the instruction in plaintiff's letter, Ex. No. 2, enclosing the bill lading and other enclosures.

(7.) For the wheat shipped on the schooner "Atmosphere" on the 22d and 23d September, (Peter Scherer, R. S. Beach,) a bill of lading was taken by George I. Jones & Co., from the Captain J. Anderson, dated Milwaukee, 23d September, 1869, for account D. Ferguson, cashier, or order, care Merchants' Bank, Watertown, Oswego, N. Y., which is set forth in the record on page 9, which bill lading was endorsed like that of the "Parsons," without recourse, D. Ferguson, Cashier, before being forwarded to the Merchants' Bank at Watertown.

George I. Jones & Co. presented the drafts drawn for the purchase of this wheat on A. F. Smith & Co. on the 23d September, the day of their date, one for $3,750, at sight, and one for $14,472.15, payable 30 days after date, and at the same time presented the bill lading, with the drafts; and, as Ferguson swears, "on the faith of the bill lading, with the drafts, the plaintiff discounted the drafts for said firm (G. I. J. & Co.), and placed the proceeds to their credit"

Ferguson on p. 7.

George I. Jones, on his examination, was not able to swear positively whether he exhibited to Ferguson the orders upon which the purchase proceeded, but he swears that possibly he did to show Mr. Ferguson the clause why Smith required the drafts drawn through the Merchants' Bank, Watertown, on pp. 22–23 in fo. 33.

But, as in this case of the schooner "Atmosphere," the bill of lading was brought to Mr. Ferguson under consignment to the care of the Merchants's Bank, it is not reasonable to suppose that Ferguson would have received the bill of lading for the wheat and discounted the drafts, without informing himself of the particulars of the order for the purchase of the wheat, as the authority for drawing the drafts, and why the bill of lading was presented with that consignment.

The sight-draft for the purchase of the cargo of the

schooner "Atmosphere," was sent to the Second National Bank of Oswego, and paid.

The bill of lading, endorsed by Ferguson "without recourse," and the time drafts were forwarded to the Merchants' Bank of Watertown, by mail in a letter dated Sept. 23d, 1869, of which the following is a copy:

Exhibit No. 9.

D. FERGUSON, *Cashier.* ALEX. MITCHELL, *President.* JOHN JOHNSTON, *Asst. Cashier.*

WISCONSIN MARINE AND FIRE INSURANCE CO. BANK,
MILWAUKEE, *Sept.* 23, 1869.

MERCHANTS' BANK, Watertown, N. Y.

Dear Sir:—I enclose for collection and returns by rem. to the Metropolitan National Bank, N. Y., for our credit draft on A. F. Smith & Co., $14,472.15. Attached to this draft are certificates of insurance, &c., B. L. for 14,867 bushels of Wheat, per schooner "Atmosphere," which property you will hold on our account till the draft is paid.

Yours truly,
JOHN JOHNSTON, *Asst. Cashier.*

The acknowledgment of receipt of this letter and enclosures is as follows:

Exhibit No. 3, on p. 6.

Exhibit No. 3.

MERCHANTS' BANK, WATERTOWN, N. Y.
Sept. 27, 1869.

D. FERGUSON, ESQ., *Cashier, Milwaukee.*

Dear Sir:—I have received your letters of the 22d and 23d instant, with enclosures as stated, and they have attention.

Respectfully yours,
J. F. MOFFITT, *Cashier.*

The letter Ex. 9 was read under same objection and exception, as to Ex. 2, enclosing bill of lading and other enclosures, relating to schooner "Thos. Parsons." (On p. 7.)

Besides B. L. and drafts there was enclosed in the letter Ex 9, a certificate of insurance on the cargo of the schooner "Atmosphere," certifying that George I. Jones & Co., were insured under and subject to the conditions of the policy referred to therein, on wheat inboard cargo schooner "At-

mosphere," at and from Milwaukee to Oswego; loss, if any, payable to the assured or order thereon, and return of that certificate; endorsed in blank George I. Jones & Co.

In the case of the "Atmosphere," as in that of the "Thos. Parsons," the case of the plaintiff goes upon a private instruction, which would lie dormant in the custody of the Watertown Bank until brought out for use; as it was, on failure to apply the proceeds of the Wheat to the payment of the time-draft, contained in the letter Ex. 9, "which property you will hold for our account until the draft is paid," as an isolated fact separated from the consideration and effect of the endorsement "without recourse," and of the relation of the Watertown Bank as Smith & Co.'s bank, and of the object in the view of all the parties in the purchase and shipment of the wheat to that bank, as Smith & Co.'s bank; and in exclusion of the obvious intent of the transmission of the bill of lading with the endorsement "without recourse," with this instruction to place the wheat at the disposal of the Watertown Bank, for delivery upon its responsibility to A. F. Smith & Co., in furtherance of the object, and in compliance with the terms of the purchase for their immediate use in the local trade, without which delivery the plaintiff, with these terms before it, when it discounted the drafts, on the faith of the bill of lading with the drafts, could not have supposed the sight-drafts would have been paid or the time accepted.

The passage of the testimony read by the plaintiff from the deposition of Ferguson, referred to the above in following the history of the circumstance of the transmission and delivery of the wheat by the "Thomas Parsons," in which Ferguson swears that what was intended by the endorsement "without recourse" was a disposition of the wheat by the Merchants' Bank, that would save the plaintiff from liability for any shortage or any other claim that might come against the plaintiff, in respect to the wheat, is equally applicable to the case of the wheat by the schooner "At-

mosphere." As is also the inference from that testimony, that the wheat was to go into the possession of A. F. Smith & Co., on arrival at Oswego, as the owner, to settle the shortage, and pay the freight and assume the contingent risk of ownership as the owner; that being the only disposition of the wheat which could be supposed to have been in the contemplation of the parties, whereby the plaintiff could be saved from liability for any claim that might come against it for shortage, freight, insurance, or any other claims.

The wheat shipped by the schooner "Atmosphere" under bill of lading for account D. Ferguson, Cashier, under consignment or subject to the order of the Merchants' Bank or its cashier, on the arrival of that vessel at Oswego on the 3d October, 1869, was delivered to A. F. Smith & Co. at their elevator under an order by J. F. Moffitt, Cashier, which had been previously transmitted to Oswego by the Merchants' Bank to await the arrival of the vessel of which the following is a copy (on p. 36.)

Exhibit No. 14, A. B. G.

NORRIS WINSLOW, Banker. J. F. MOFFIT, Cashier.

MERCHANTS' BANK, Watertown, N. Y.,
Sept. 27, 1869.

J. ANDERSON, Esq.,
Master Schooner "Atmosphere,"
Oswego, N. Y.

Dear Sir,—Please deliver your cargo of 14,857 bushels of No. 2 Mil. Spring Wheat in the Corn Exchange Elevator of Oswego, N. Y., for the account of D. Ferguson, Cashier, subject to the order of this Bank.

Yours truly, J. F. MOFFITT.

And Smith & Co. on the said 3d day of October having previously paid the sight draft and accepted the time draft in performance of the requirement of the terms of the purchase and invoice on their part on that day, settled and paid the freight and received the wheat into their elevating warehouse for their own account as the owners, as shown by the entries in the grain book of A. F. Smith & Co., put in evi-

dence by the plaintiff (on p. 49), and as it was contemplated by the circumstance of the sale and of the transmission by the plaintiff that they should do.

The order for the captain of the schooner "Atmosphere" was transmitted to Oswego in a letter addressed to A. F. Smith & Co., proprietors of the Corn Exchange Elevator, of which the following is a copy (on p. 44.)

Exhibit J. F. M., No. 4, A. B. G.

September 27, 1869.

A. F. SMITH & Co.,
Proprietors Corn Exchange Elevator,
Oswego, N. Y.

Dear Sirs.—I enclose herewith an order to deliver to you the cargo of schooner "Atmosphere," 14,867 bushels No. 2 Milwaukee Spring Wheat, consigned to us by D. Ferguson, Cashier, Milwaukee, Wis., and is to be held by you for us until the following draft is paid:

George I. Jones & Co. on A. F. Smith & Co.,
October 26th, - - - - $14,472.15.

Yours resp'y, J. F. MOFFITT, *Cash'r.*

All that these letters enclosing the orders for the captains, import upon any fair construction, is that the wheat, after delivery at their warehouse, after their payment of the sight and acceptance of the time drafts, was to be held by A. F. Smith & Co., for account of the Merchants' Bank, as security for the payment of the time drafts; without any implication that it was to be held by them for account of the plaintiff or the Merchants' Bank as the owner, until the time drafts were paid, nor otherwise than as the property of A. F. Smith & Co. If to be held by them as the property of the plaintiff, this might subject the plaintiff to some charge for storage or return freight or other claim contrary to what was intended.

By the law of the State of New York, known as the Warehousing Act, (L.L. 1858, Ch. 326, amended by Acts of 1859, Ch. 353, and 1866, Ch. 440), it is provided that no warehouseman, wharfinger or other person shall *sell* or incumber, *ship*, transfer, or in any manner remove beyond his imme-

diate control, any goods, wares, merchandise, grain, flour or other produce or commodity, for which a receipt shall have been given by him as provided in that Act, whether received for storing, shipping, grinding, manufacturing, or other purposes, without the written assent of the person or persons holding such receipt.

This provision in the 4th section. And by the 7th section of the Act as amended by the 3d section of the Act of 1866, ch. 440, it is provided that any warehouseman, &c., who shall wilfully violate any of the foregoing provisions of the said Act as thereby amended, shall be deemed guilty of a misdemeanor and upon indictment and conviction shall be fined in any sum not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both such fine and imprisonment, &c.

If, as it was assumed by the plaintiff's counsel, in his argument below, there had been any ——— purpose that the wheat should be held on delivery at the elevator for storage merely, this would have been signified and secured by some unequivocal act, such as taking a warehouse receipt under the provisions of the foregoing law.

But no warehouse receipt was ever called for or taken, nor any inquiry ever made after any consignments of wheat received through the Merchants' Bank, until after the failure of A. F. Smith & Co.

Moffatt, p.p. 41, 42, (foot of former and top of latter.)

Bickford, on p. 59.

A. F. S. & Co. had paid on cargo of the "Thomas Parsons" including freight, $6,000; and on cargo of the "Atmosphere," $5,534.04; and but for casualties, producing their failure which no one has alleged was fraudulent, would no doubt have paid the time drafts.

But further, the shipment for delivery at Oswego, as the place of business of A. F. Smith & Co., and the presentation of the bills lading with the drafts for discount, accom-

panied by the orders for the purchase, showing that the purchase was for the immediate use of A. F. S. & Co. on a stipulation as required by their local trade for a credit for the balance, after paying the sight drafts drawn for a margin, was a direction by the Commission Merchants to forward the bills for delivery of the wheat to A. F. S. & Co. through the Merchants' Bank, on payment of the sight and acceptance of the time drafts.

And this direction in conformity to the terms of the invoices upon which the sight were paid and the time accepted, and the transmission of the bills lading to the Merchants' Bank as a consignee designated by A. F. Smith & Co. or as their Bank, and under an endorsement by the plaintiff, which upon acceptance, transferred all responsibility for claims which might come against the wheat and all risk of property from the plaintiff to this Bank; and the delivery of the successive cargoes to the elevating warehouse of A. F. S. & Co. at Oswego, on orders transmitted from Merchants' Bank through A. F. S. & Co. for the Captains, thereby so far as the outside world was concerned, leaving the order and disposition of the property with A. F. Smith & Co., are stronger evidence that the real intention was that A. F. Smith & Co. should have the possession through that Bank, to raise the money than any inference from the formal instructions upon which the plaintiff's case goes upon a construction as claimed, which would have defeated the object in view in the purchase and shipments, and upon the advices of which there is no reason to suppose that A. F. S. & Co. would have paid sight or accepted time drafts, and that the formal instructions were intended only as a means of enforcing the obligations of consignee and purchaser, to provide for the payment by an appropriation of the proceeds or otherwise; but which would be a fraud upon third parties dealing with the purchaser on the faith of his possession in their attempted use as a means of overreaching the title of such third parties.

The general question under the issue joined under the exceptions upon the effect of the evidence, documentary and other, are first, whether the plaintiff had any title or right to the possession, after the transfer and delivery of the bill of lading to the Merchants' Bank, and the delivery to A. F. S. & Co.;

And second, whether A. F. S. & Co, being in the rightful possession as the owners, holding for their own account and risk under an authorized ostensible and real ownership, had such an interest or possession that the defendants could acquire title as bona fide purchasers by advancing on consignment of the wheat to them by A. F. Smith & Co.; or whether the defendants did not acquire title as such purchasers by reason of the intent deducible from the terms of the purchase by A. F. S. & Co., and the circumstances of the transmission and delivery at their warehouse at Oswego, that A. F. Smith & Co. should sell or dispose of the wheat to realize for the payment of the drafts.

II. (1.) After the plaintiff had rested, the defendants proved the shipment at Oswego on board each of the canal boats, "Mine Dingman," "Harm and Pest," and "E. D. Case," from the possession of A. F. Smith & Co., under the several bills of lading, showing a shipment by that firm for their account, under consignment to defendants, as the consignees in New York, and the transmission of the same with the sight draft attached, and accompanying documents, and the payment of the drafts on the delivery of the bills lading with accompanying documents, and offered them in evidence, for the purpose of showing title in the defendants as consignees, by reason of their advances by payment of the sight drafts made on the several consignments, by bill of lading, of the wheat shipped by A. F. Smith & Co., to the defendants, in connection with evidence that such advances were made in the usual course of business, and *bona fide*, and without notice of any claim of

plaintiff, or of any other person thereto, except A. F. Smith & Co., the shippers, who were in possession.

p.p. 63 to 70.

The plaintiff's counsel objected to the reception of this evidence, and after the discussion of the effect of the documentary and other evidence bearing upon the question of title, the Judge excluded the testimony offered, in conformity to the views of the Circuit Judge, as he understood them, in disposing of the case of the National Exchange Bank against the same defendants.

The defendants' counsel thereupon duly excepted to this decision, rejecting the evidence offered.

The defendants' counsel further excepted to this exclusion of the evidence, as depriving the defendants of what they claimed to be their right to go to the jury, on the question of the authority of the Merchants' Bank, to deliver this wheat to A. F. Smith & Co., on the evidence in the case, or in connection with further evidence which they offered; and as to the true relation of A. F. Smith & Co. to this wheat, under the arrangement under which it was purchased and shipped at Milwaukee.

The defendants further excepted to the conclusion involved in the rejection of the evidence, that there was nothing to go to the jury.

This exclusion of this evidence which disposed of the whole question of plaintiff's claim of title in its favor, and denied that the defendants had any ground of title on the evidence as presented in the case, is assigned as error under the foregoing exception.

(2). Upon the offer of plaintiff's Counsel to read in evidence the letter, Ex. No. 2 (on p. 6), enclosing B. L. schooner "Thomas Parsons" and other enclosures to the Merchants' Bank, the defendants objected to the reading of so much thereof as purported a direction to the Merchants' Bank to hold the wheat or bill of lading for account of the Milwaukee Bank until the payment of the draft, as not ad-

missible until evidence was adduced that it was authorized by the arrangements under which the wheat was bought and shipped; also, as a private instruction from the Milwaukee Bank to the Merchants' Bank not admissible to affect the authority of the Merchants' Bank in respect to delivery as to third parties, or as to these defendants.

The plaintiff's Counsel contended that it was admissible to show what were the rights and powers of the Merchants' Bank, as the agent of the Milwaukee Bank, and as part and parcel of the *res gestæ*.

The objection was overruled, and the defendants excepted.

Upon the offer of plaintiff to read in evidence the letter, Ex. No. 9 (on pp. 7 and 8), enclosing B. L. schooner "Atmosphere," &c., defendants' Counsel objected on same ground as above stated to the reading of the letter, Ex. No. 2. The objection was overruled by the Judge, and the defendants excepted.

The defendants assign the decision of the Judge overruling these objections as error under the exceptions.

(3). The defendant offered to read in evidence from the deposition of David Mannering as to the character and uses of the elevating warehouse in Oswego, the business of A. F. Smith & Co., and the purposes for which they, as proprietors of the Corn Exchange Elevator, used that elevator as therein on pp. 71 to 73, for the purpose of ascertaining and helping to interpret the arrangements or orders for delivery of the wheat at the Corn Exchange Elevator; and they also offered the evidence, as in said deposition, of the general usage at Oswego on consignments to banks by B. L. to place the wheat, on arrival at Oswego, in elevating warehouses of the commission merchant or dealer in grain on whom the drafts were drawn after acceptance of the drafts, as bearing upon the question of authority of the Watertown Bank to order the delivery of the wheat in question to the Corn Exchange Elevator of A. F. Smith & Co., and of the purpose for which it was so ordered; and for ascertaining

the meaning, and helping to interpret the meaning of the orders for the delivery of the wheat into the elevator.

The evidence was excluded, and the defendants excepted. (See on pp. 71–73.)

The exclusion of this evidence is assigned as a further error.

(4.) The exclusion by the Judge of the evidence offered by defendants as to sources of title on grounds which assume that the claim of superior title of the plaintiff was incontestible on the evidence in the bill of exceptions, and without any question for the jury, it is submitted leaves the whole question of title open under the exception to such exclusion upon the consideration and effect of the evidence as it might be viewed by a jury.

For greater caution, the defendants' renewed offer of evidence, which had been rejected in connection with requests for leave to go to the jury, and presented other requests, as found in the bill of exceptions on p. 73 to the end of the last paragraph on p. 76, to which their counsel ask leave to refer the Court without recital here.

To the said decision of the Judge sustaining the objection made by the plaintiff, to each of these offers and requests, the defendants excepted.

The defendants assign each of these rulings as error.

(5.) As to the damages.

The claim of the plaintiff is set forth in the bill of exceptions (on p. 77.)

What it proposed was to charge the defendants for value at gross amount sales of 11,334 $\frac{27}{60}$ bushels of cargo schooner "Thos. Parsons," and interest, without any deduction for freight or other charges paid for taking care of the property, and without accounting for, or bringing into the computation the residue of the cargo of 18,734 $\frac{27}{60}$ bushels.

And for value at gross amount sales of 12,025$\frac{33}{60}$ bushels of cargo of schooner "Asmosphere," and interest, without any deductions of freight or other charge for taking care of

the property, and without accounting for or bringing into the computation the residue of the cargo of 14,805$\frac{1}{10}$ bushels, limiting the claims as to wheat from the schooner "Atmosphere," to amount unpaid draft held by it, with interest.

(*a*) The defendants ask the Court to charge the jury that, if the plaintiff was entitled to recover in the action the value of either of these parcels of wheat, that in ascertaining such value, the freight and other charges for storage, screening and blowing should be deducted, and if the Court should charge that the freight paid was not to be deducted, then to charge that the other charges for taking care of the property should be deducted.

The statement of the freight and these other charges paid is found on p. 50.

This claim was disallowed by the Judge, and defendants excepted.

See statement, charge and exception on pp. 77, 78.

The defendants assign this disallowance as error.

(*b*) The defendants further requested the Judge to charge that, in respect to any particular parcel, the amount due upon the cargo of which it was a part, should be pro-rated in proportion to the number of bushels of such parcel to the whole cargo, and the recovery limited by such pro-rating in respect to the particular parcel.

The Judge refused to so charge, and the defendants excepted.

This ruling is assigned for error.

(*c*) The defendants also requested the Judge to charge that, the allowance of interest was in the descretion of the jury.

The Court refused so to charge, and the defendants excepted.

This ruling is assigned as error.

6. The judge then directed the jury to find a verdict for the full amount claimed by the plaintiff in his statement in his charge, as follows:

Gentlemen of the Jury: You have noticed, of course, the direction that this case has finally taken. It has been deemed by the Court to be its duty to dispose of this case on the ground that the conceded, or at least in my view, uncontrovertible facts in the case raise only a question of law which it is the duty of the Court to dispose of. You are aware that in this Court the Court is the exclusive judge of the law, as the jury are the exclusive judges of facts. The counsel for the defendants think that the Court has failed to appreciate the suggestions which they have made, and that there are facts in the case which the Court ought to have submitted to the jury, and taken their finding thereon. The Court, not having come to that conclusion, but believing that this controversy turns, not upon a question of fact that is controvertible, but upon the question of law arising out of uncontrovertible facts, the Court feels it its duty to dispose of this case itself, and it therefore directs you to return a verdict for the plaintiffs for ($35,205.28) Thirty-five thousand two hundred and five $\frac{28}{100}$ dollars.

The defendants excepted to the charge as a direction to the jury to find a verdict for the plaintiff (on p. 78).

POINTS.

First.—This being an action of trover, plaintiff was bound to show a complete property, general or special, in the wheat, or they could not recover; 1 Ch. Pl., 7 Am. Ed. p. 170; 2 Saund., 47 A Note 1; Brown on Actions at Law, 426; Dillenback *vs.* Jerome, 7 Cow., 294; Hotchkiss *vs.* McVickar, 12 John, 403.

When this action was commenced they had no property, general or special.

Second.—The transmission of the invoice on the shipment under the bill lading to be forwarded to the Merchant's

Bank, for delivery of the wheat to the purchaser through that bank, upon payment of the sight and acceptance of the time drafts according to the requirement of the terms of sale and of the invoice, was an appropriation by the acts of both parties to the sale of the wheat shipped to the use of A F. Smith & Co.

Richardson *vs.* Dunn, 2 Ad. & El. N. S., 217.
Alexander *vs.* Gardner, 1 Bing., N. C., 671.

This invoice, which has the strength of a bill of sale, was documentary evidence of title placed in the hands of A. F. Smith & Co. as the purchaser, whereby their right in the wheat shipped, upon payment of the sight and acceptance of the time drafts as noted in the invoice was acknowledged, and whereby they were furnished with the means of asserting their title, and authorized to receive the wheat on delivery through the Merchant's Bank for their own account.

See what is said by Johnson J., delivering the opinion of the Court of the invoice as a document of title in the claim of W. & J. Wilkins, in case of the Merrimack, 8 Cr. 318, 329, 330, where the B. L. was made out to a third party.

Third.—Any possessory right or legal title and right of possession, acquired by the plaintiff by discounting the drafts on presenting the bill lading accompanied by an exhibition of the orders, showing the terms of the purchase, would pass to the Merchants' Bank on transferring the bills for value to that Bank, as a consignee, designated by A. F. Smith & Co., or as their Bank, or it would be determined by the performance of the conditions of the pledge to the plaintiff.

The undertaking of the Watertown Bank to take care of the grain in question for the plaintiff, and its

acceptance of the bills lading under the assignment, "without recourse," whereby it assumed the responsibility of the plaintiff for all claims that might come against it as pledgee, and for all contingent risks (see testimony of D. Ferguson on p. 10, above referred to), was a good and valuable consideration, and the transfer and delivery of the bill lading by the plaintiff to that Bank, for such consideration, passed the plaintiff's title to that Bank. See the case of Lickbarrow *v.* Mason.

Dows *v* Rush, 28 Barb., 158.

Dows *v.* Greene, 24 N. Y., 638.

Wilmshurst *v.* Bowker, Ex. Ch., 1844.

7 Mann & Granger, 882.

Ferguson swears that the drafts were presented with the bill of lading, and that the discount was made on the faith of the bill of lading, with the drafts; but there is no proof that the drafts were discounted upon pledge of the bills of lading for the payment of the drafts.

Discounting the drafts upon presenting them with the bill of lading, accompanied by an exhibition of the orders for purchase, showing that it was made for the immediate needs of A. F. S. & Co., in their local trade, for part sight equivalent to cash, and balance on time, which their local trade required, was a pledge of the bill of lading, as security only for the payment of the sight and acceptance of the time drafts.

Any instruction as to holding, after the title passed, could have no operation, except as matter of contract, or condition subsequent.

And the instruction as to holding, after the conditions of the pledge were performed by payment of the sight and acceptance of the time draft, were unauthorized, and A. F. S. & Co. in possession after the performance of these conditions, had the full power of absolute ownership.

Fourth.—But further, if the intent and meaning were not that the Merchants' Bank should have the full power of the plaintiff as the transferee of its title upon its responsibility for the wheat, in case the drafts were not paid, in view of the facts disclosed in the evidence of Ferguson, that what was intended was a disposition of the wheat on arrival at Oswego, so as to save the plaintiff from any claim for shortage or any other claim that might come against it, which could only be effectuated by a delivery of the wheat to A. F. Smith & Co. to settle the shortage, pay the freight as the owner, and assume the risk of ownership, the fullest requirement of obligation of the Watertown Bank from the instructions accompanying this transmission, if authorized, was so to deliver the wheat as was contemplated, with a notice such as contained in the letter enclosing the orders for the captain, importing that the wheat was to be held by them for account the Merchants' Bank as security for the payment of the time drafts; without any implication under the circumstances that it was to be held by them for account of the plaintiff or the Merchants' Bank as the owner, nor otherwise than as the property of A. F. Smith & Co. as the owners.

In this view, A. F. S. & Co. were in the rightful possession, as the owners, holding the grain for their own account and risk as such, at the most subject to the order of the Merchants' Bank as security for the payment of the drafts.

I have above referred to the evidence of the real intention being that A. F. S. & Co. should have the use of the grain to sell to meet the drafts; and to the evidence in the circumstance of the transmission and delivery, that they should have the order and disposition of the property at least so far as the outside world was concerned.

Fifth.—It is well settled law in New York when the owner of property, goods or choses in action not negotiable, confers upon another only an apparent title or power of disposition of it, he is estopped from asserting his title as against any innocent third party who has dealt with the apparent owner in reference thereto without knowledge of the claim of the true owner.

McNeil *vs.* The Tenth National Bank, 46 N. Y., 325.

Moore *vs.* Metropolitan Bank, 55 N. Y., 41.

Pickering *vs.* Buske, 15 East, 38.

Sixth.—The claim of the defendants to protection stands on as strong a ground or stronger than that of a *bona fide* purchaser from mortgager, in possession of merchandise, with power of control under an unrecorded mortgage as in Thompson *vs.* Blanchard, 4 Coms. 303, or of a *bona fide* purchaser from a vendee in possession obtained by fraud as in Paddon *vs.* Taylor, 44 N. Y., 371; or McCombie *vs.* Spader, 3 N. Y., Supreme Court reports (edited by Thompson & Cook, A. D. 1874;) or of the holder of a B. L., for wheat from a purchaser into whose boat wheat had been discharged from an elevator, thereby ascertaining the weight or quantity a necessary preliminary to the passing of title in sales by weight or measure, to whom such delivery was made under an order on the elevator to deliver the wheat subject to the order of the seller until paid for, so as to retain the legal title.

This last was the case of Rawle *v.* Deshler, 3 Keyes, 575, S. C. 28, How. Pr. R. 66.

See also cases of chattel mortgage on goods in store. Griswold *v.* Sheldon, 4 Coms. 581.

Fourth.—But further, if the intent and meaning were not that the Merchants' Bank should have the full power of the plaintiff as the transferee of its title upon its responsibility for the wheat, in case the drafts were not paid, in view of the facts disclosed in the evidence of Ferguson, that what was intended was a disposition of the wheat on arrival at Oswego, so as to save the plaintiff from any claim for shortage or any other claim that might come against it, which could only be effectuated by a delivery of the wheat to A. F. Smith & Co. to settle the shortage, pay the freight as the owner, and assume the risk of ownership, the fullest requirement of obligation of the Watertown Bank from the instructions accompanying this transmission, if authorized, was so to deliver the wheat as was contemplated, with a notice such as contained in the letter enclosing the orders for the captain, importing that the wheat was to be held by them for account the Merchants' Bank as security for the payment of the time drafts; without any implication under the circumstances that it was to be held by them for account of the plaintiff or the Merchants' Bank as the owner, nor otherwise than as the property of A. F. Smith & Co. as the owners.

In this view, A. F. S. & Co. were in the rightful possession, as the owners, holding the grain for their own account and risk as such, at the most subject to the order of the Merchants' Bank as security for the payment of the drafts.

I have above referred to the evidence of the real intention being that A. F. S. & Co. should have the use of the grain to sell to meet the drafts; and to the evidence in the circumstance of the transmission and delivery, that they should have the order and disposition of the property at least so far as the outside world was concerned.

Fifth.—It is well settled law in New York when the owner of property, goods or choses in action not negotiable, confers upon another only an apparent title or power of disposition of it, he is estopped from asserting his title as against any innocent third party who has dealt with the apparent owner in reference thereto without knowledge of the claim of the true owner.

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This last was the case of Rawle *v.* Deshler, 3 Keyes, 575, S. C. 28, How. Pr. R. 66.

See also cases of chattel mortgage on goods in store.

Griswold *v.* Sheldon, 4 Coms. 581.

Edgell *v.* Hart, 5 Selden, 213

Ford *v.* Williams, 24 N. Y., 359.
2 R. S., N. Y. 5 Ed., 222 Ss. 9, 10.

Seventh.—The ninth point in the case of David Dows, *et. al.*, plaintiff in error, against the National Exchange Bank of Milwaukee, is referred to as applicable to the circumstances of this case.

In addition to the cases mentioned, I add for illustration, the case of the Ontario Bank vs. the New Jersey Steamboat Co., N. Y. Ct. of Appeals, Jan. '75.

Eighth.—The effect of the documentary evidence relied on by the plaintiff depending on collateral facts in pais and extrinsic circumstances, the inferences of fact to be drawn from them should have been left to the jury.

Etting *v.* Bank of U. S., 11 Wheaton, 59.
Richardson *v.* Boston, 19 How., 263.
Witherington *vs.* Herring, 5 Bing. R., 442.
Hicks *vs.* Hankin, 4 Esp., 114.
Howard *vs.* Sherwood, Eng. L. R. 2 C. P., 148.
Supervisors *v.* Schenck, 5 Wall., 784.
N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30
Railroad *v.* Stout, 17 Wall., 657.
Brown *v.* McGrau, 14 Pet., 479.
Barreda *v.* Silsbee, 21 How., 147.

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Ninth.—The exception taken to the reading in evidence of the instructions contained in the letter, Ex. 2, (on p. 6); and the same exception to a like instruction in this letter, Ex. 9, (on pp. 7 and 8) was well taken.

As a private instruction it was not admissible to affect the authority of the Merchant's Bank in respect to the delivery as to third parties, or as to these defendants below.

Witherington *v.* Herring, 5 Bing. R., 442.
Hicks *v.* Hankin, 4 Esp., 114.
Howard *v.* Sherwood, Eng. L R. 2 C. P., 148.
Supervisors *v.* Schenck, 5 Wall, 784.
N. Y. & N. H. R. R. Co. *v.* Schuyler, 34, N. Y., 30.

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Tenth.—The exceptions taken to the exclusion of the evidence offered, as above stated, from the deposition of David Mannering are well taken.

Bank of Washington *vs.* Triplet, 1 Peter, 25.
Bayliff *vs.* Butterworth, 1 Exch. 425–428.
Pollock *vs.* Stables, 17 L. J. N. S., 352.
Merchant's Bank *vs.* State Bank, 10 Wall, 604.

Eleventh.—It is submitted that the several exceptions above referred to on the question of the damages were well taken.

Twelfth.—The judgment should be reversed, and a new trial ordered.

C. VAN SANTVOORD,
Counsel for deft's, plff's in error.

3 Kay s 575
28 Bradwell Ill 66.

= 8 Chancery Appeals =

= 12 Peradelle p. 362 =

= Tench =

= 40 Illinois 328 =